

1997

Lewis v. United States: A Requiem for Aggregation

Catholic University Law Review

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Recommended Citation

Catholic University Law Review, *Lewis v. United States: A Requiem for Aggregation*, 46 Cath. U. L. Rev. 1057 (1997).

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LEWIS V. UNITED STATES: A REQUIEM FOR AGGREGATION

The Sixth Amendment to the United States Constitution guarantees citizens the right to a trial by jury in all criminal prosecutions.¹ The Supreme Court has limited this right by applying it only to the prosecution of "serious,"² and not "petty,"³ offenses.⁴ This qualification balances

1. See U.S. CONST. amend. VI. The Sixth Amendment provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

There is a difference between the language of the Sixth Amendment, which uses the phrase "criminal prosecutions," and Article III, Section 2, Clause 3, which uses "Trial of all Crimes." Compare *id.* amend VI, with *id.* art. III, § 2, cl. 3. The difference between the two constitutional provisions has received some attention in academic literature, but has been treated as having no interpretive consequence. See Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 HARV. L. REV. 917, 968-75 (1926).

Article III, Section 2, Clause 3 of the Constitution provides in full:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

U.S. CONST. art. III, § 2, cl. 3.

2. An offense is serious if the legislature has authorized a minimum time of imprisonment of over six months for its commission. See *Baldwin v. New York*, 399 U.S. 66, 69 & n.6 (1970). An offense that otherwise would be considered petty may be treated as a serious offense by a court if it determines that additional statutory penalties, when read in conjunction with the maximum authorized prison sentence, demonstrate that the legislature considered the offense to be serious. See *Richter v. Fairbanks*, 903 F.2d 1202, 1204-05 (8th Cir. 1990) (holding that a mandatory 15-year revocation of a drivers' license for a third conviction for driving while under the influence of alcohol (DWI) showed that the legislature determined that the offense was serious even though the maximum authorized prison sentence made the offense presumptively petty); see also *infra* note 92 (discussing *Richter*).

3. An offense is presumed to be petty if the maximum authorized prison term for its commission is six months or less. See *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989). Under federal law, a petty offense is a Class B misdemeanor, a Class C misdemeanor, or an infraction. See 18 U.S.C. § 19 (1994) (defining a petty offense); *id.* § 3559(a)(7)-(9) (1994) (defining penalties for Class B and C misdemeanors and infractions). A fine imposed for a petty offense may not exceed an amount set forth in 18 U.S.C. § 3571(b)(6) or (7) for individuals, or an amount set forth in 18 U.S.C. § 3571(c)(7) for organizations. See *id.* § 19. But see *United States v. Soderna*, 82 F.3d 1370, 1379 (7th Cir.),

the defendant's right to a jury trial with the state's interest in efficiently administering its judicial system.⁵

Courts apply an objective test when determining whether an offense is serious or petty,⁶ the most relevant factor being the maximum prison term authorized by the legislature for a particular offense.⁷ Offenses carrying a prison term of more than six months are defined as "serious," and defendants charged with them are entitled to a trial by jury.⁸ Those carrying a sentence of six months or less are presumed to be petty.⁹ Absent a showing of significant additional statutory penalties, a defendant charged with a petty offense is not entitled to a trial by jury.¹⁰

cert. denied, 117 S. Ct. 507 (1996) (holding that a maximum fine of \$10,000 for a presumptively petty offense did not make that offense serious).

In some states, there exists a scheme by which a defendant may be tried without a jury for a petty offense, and if convicted, may appeal and request a trial de novo before a jury. See RICHARD B. McNAMARA, CONSTITUTIONAL LIMITATIONS ON CRIMINAL PROCEDURE § 17.02 (1982). This type of structure does not violate the defendant's Sixth Amendment jury trial rights. See *Ludwig v. Massachusetts*, 427 U.S. 618, 630 (1976); see also *Haar v. Hanrahan*, 708 F.2d 1547, 1550-51 & n.15 (10th Cir. 1983) (discussing New Mexico's statutory trial de novo provisions and the *Ludwig* decision).

4. See *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968). Despite the clear import of the jury trial provisions in the Constitution and the Bill of Rights, scholars have analyzed the history of these two provisions and have generally agreed that the framers of the Constitution intended to provide a trial by jury only for those crimes that were considered "serious" at common law. See Frankfurter & Corcoran, *supra* note 1, at 968-75. See generally JAMES C. CISELL, FEDERAL CRIMINAL TRIALS § 1240 (3d ed. 1992 & Supp. 1995) (discussing how to differentiate between a petty offense and a serious offense to determine whether a defendant has a right to a trial by jury). But see III ABA STANDARDS FOR CRIMINAL JUSTICE § 15-1.1 (2d ed. 1980)[hereinafter ABA STANDARDS] (proposing that the right to a trial by jury, "should be available to a party . . . in criminal prosecutions in which confinement in jail or prison *may be imposed*," as the drafters argued that the right to a trial by jury was so fundamental in our system of justice that it should be unrestricted (emphasis added)).

5. See *Duncan*, 391 U.S. at 160 (reasoning that the benefits of efficient management of the criminal justice system outweighed the consequences defendants charged with petty offenses faced).

6. See *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937) (holding that courts should examine objective standards of the seriousness of an offense in determining whether a defendant is entitled to a trial by jury).

7. See *Baldwin v. New York*, 399 U.S. 66, 68 (1970) (finding that the maximum authorized prison sentence was the most relevant and objective criteria of whether an offense was petty or serious).

8. See *Baldwin*, 399 U.S. at 73-74 (holding that crimes punishable by more than six months in prison are "serious" and persons charged with them are entitled to a trial by jury); *Duncan*, 391 U.S. at 161-62 (holding that the crime of simple battery, punishable in Louisiana by a maximum of two years in prison, was "serious" and that the defendant was entitled to a trial by jury).

9. See *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989).

10. See *id.* (finding that a defendant charged with a petty offense is not entitled to a jury trial, unless he can show that significant statutory penalties viewed along with the authorized prison term indicate that the legislature viewed the offense as serious).

Situations have arisen where a defendant is charged with more than one petty offense.¹¹ In such cases, courts have noted that the trial judge's prerogative to impose consecutive sentences potentially exposed such a defendant to an aggregate sentence of more than six months in prison.¹² In light of this possibility, those courts held that defendants charged with multiple petty offenses were entitled to a jury trial.¹³

Courts allowing for a trial by jury in multiple petty offense prosecutions fell into two categories. One group took an objective view, reasoning that a defendant had an absolute right to a trial by jury when charged with multiple petty offenses because he potentially faced, in the aggregate, more than six months in prison if consecutive sentences were imposed.¹⁴ This was labeled an "objective" approach to aggregation, because it allowed for a strict determination of the right to a jury trial

A mandatory 15-year revocation of a drivers' license for a third conviction for driving under the influence of alcohol has been held to be a significantly severe statutory penalty that, when read alongside a three to six month prison term, made a presumptively petty offense a serious one. *See Richter v. Fairbanks*, 903 F.2d 1202, 1204-05 (8th Cir. 1990). Terms of parole that may be imposed at the discretion of the sentencing judge, however, are not sufficient to show that the offense was considered serious. *See United States v. Nachtigal*, 507 U.S. 1, 5-6 (1993) (per curiam). Moreover, a fine in excess of the maximum fine authorized for a petty offense has been held not to make an offense serious. *See United States v. Soderna*, 82 F.3d 1370, 1379 (7th Cir.), *cert. denied*, 117 S. Ct. 507 (1996).

11. *See, e.g., United States v. Brown*, 71 F.3d 845, 846 (11th Cir.), *cert. denied*, 116 S. Ct. 2580 (1996) (defendant charged with two petty offenses); *United States v. Lewis*, 65 F.3d 252, 253 (2d Cir. 1995), *aff'd*, 116 S. Ct. 2163 (1996) (same); *United States v. Coppins*, 953 F.2d 86, 87 (4th Cir. 1991) (defendant charged with three petty offenses); *United States v. Bencheck*, 926 F.2d 1512, 1514 (10th Cir. 1991) (defendant charged with four petty offenses).

12. *See Lewis*, 65 F.3d at 255; *Coppins*, 953 F.2d at 90; *Bencheck*, 926 F.2d at 1514; *see also* 18 U.S.C. § 3584(a) (1994) ("If multiple terms of imprisonment are imposed at the same time . . . the terms may run concurrently or *consecutively*." (emphasis added)).

13. *See Coppins*, 953 F.2d at 90 (holding that a defendant charged with multiple petty offenses arising from the same incident was entitled to a trial by jury when the aggregate prison sentence faced exceeded six months); *Rife v. Godbehere*, 814 F.2d 563, 564-65 (9th Cir. 1987) (same); *Haar v. Hanrahan*, 708 F.2d 1547, 1553 (10th Cir. 1983) (recognizing that a defendant charged with multiple petty offenses has a jury trial right if threatened at the start of trial with more than six months in prison); *United States v. Potvin*, 481 F.2d 380, 382 (10th Cir. 1973) (holding that a defendant charged with multiple petty offenses arising out of the same criminal transaction has a right to a jury trial); *United States v. Musgrave*, 695 F. Supp. 231, 232-33 (W.D. Va. 1988) (same); *United States v. Coleman*, 664 F. Supp. 548, 549 (D.D.C. 1985) (same); *United States v. O'Connor*, 660 F. Supp. 955, 956 (N.D. Ga. 1987) (same); *State v. Sanchez*, 786 P.2d 42, 46 (N.M. 1990) (same).

14. *See Coppins*, 953 F.2d at 90 (holding that if consecutive sentences were imposed, the appellant faced fifteen months in prison, and as a result, was entitled to a trial by jury because the potential prison term exceeded the six month maximum sentence for a petty offense); *Sanchez*, 786 P.2d at 46 (finding that an objective measure was in accord with the constitutional jury trial guarantees).

based solely upon the number of petty offenses charged.¹⁵ A second group of courts adopted a "subjective" approach, allowing for aggregation of petty offenses and a trial by jury only when a defendant actually faced more than six months in prison at the outset of the trial.¹⁶ Thus, under the subjective approach, the jury trial right could be extinguished through a pretrial commitment by the trial judge not to sentence the defendant to more than six months in prison.¹⁷

Other courts, however, adopted neither the objective nor the subjective approach, and refused to allow defendants charged with multiple petty offenses a jury trial under any circumstances.¹⁸ These courts reasoned that, under the petty offense doctrine, the definition of an offense as petty determines whether a defendant has a right to a trial by jury—not the number of times a defendant is accused of committing a petty offense.¹⁹

In *Lewis v. United States*,²⁰ the Supreme Court resolved the conflict of whether the petty offense doctrine permits a defendant charged with multiple petty offenses the right to a trial by jury.²¹ Ray Lewis was a United States Postal Service employee who was charged with two counts of ob-

15. See *Sanchez*, 786 P.2d at 43. But see *Bencheck*, 926 F.2d at 1517 (discussing and declining to adopt the "objective" type of aggregation); see also *infra* notes 122-29 and accompanying text (discussing the *Bencheck* case).

16. See *Bencheck*, 926 F.2d at 1518 (giving a defendant charged with multiple petty offenses the right to a trial by jury only when, at the beginning of trial, a defendant actually faced more than six months in prison in the aggregate).

17. See *id.*; see also *Rife*, 814 F.2d at 565 (permitting a trial judge to deny a defendant charged with multiple petty offenses a jury trial, so long as the state later "remedied" this denial by re-sentencing the defendant to no more than six months in prison); cf. III ABA STANDARDS, *supra* note 4, at § 15-1.2(a)-(b) & commentary at 16-17, 20-21 (proposing that a defendant be allowed to "waive" a trial by jury right "with the consent of the prosecutor, . . . [if] advised by the court of his or right to trial by jury, [and the defendant] personally waives the right to trial by jury, either in writing or in open court for the record").

18. See *United States v. Brown*, 71 F.3d 845, 847 (11th Cir.), *cert. denied*, 116 S. Ct. 2580 (1996).

19. See *United States v. Lewis*, 65 F.3d 252, 254-56 (2d Cir. 1995), *aff'd*, 116 S. Ct. 2163, 2168 (1996) (holding that a defendant charged with multiple petty offenses was not entitled to a trial by jury as petty offenses are excluded from the Sixth Amendment right to a jury trial); *Brown*, 71 F.3d at 847 (holding that only serious crimes trigger the protection of the Sixth Amendment right to a trial by jury, and not the presence of multiple petty offenses that possibly could place the defendant in jail for a significant period of time).

20. 116 S. Ct. 2163 (1996).

21. See *id.* at 2168.

struction of the mails²²—a crime that carries a maximum penalty of no more than six months in prison²³ and a fine of up to \$5,000.²⁴

Prior to the commencement of trial, Lewis requested a trial by jury.²⁵ The magistrate judge, however, denied the request, stating that she would not sentence him to more than six months in prison if convicted.²⁶ Lewis was convicted on both counts and received three years probation on each count, with the sentences to run concurrently.²⁷ He appealed his denial of a trial by jury, arguing that he had faced the possibility of more than six months in prison notwithstanding the trial court's pretrial commitment.²⁸ The magistrate judge's decision was affirmed by both the United States District Court for the Eastern District of New York and the Court of Appeals for the Second Circuit.²⁹

Noting a split between the Circuit Courts of Appeal, the Supreme Court granted certiorari,³⁰ and affirmed that Lewis was not entitled to a trial by jury.³¹ The Court first reasoned that when Congress authorizes an offense to carry a prison term of six months or less, the offense is petty.³² The Court then indicated that a petty offense did not become a serious offense simply because a defendant committed it multiple times.³³ The Court, therefore, held that a defendant charged with multiple petty offenses does not have a right to a trial by jury.³⁴

Justice Kennedy, joined by Justice Breyer, concurred in the judgment, and endorsed the subjective approach to aggregation, focusing on the fact that it was proper for the trial judge to deny Lewis's jury trial request because of her pretrial commitment not to impose a sentence of more

22. See *id.* at 2165. Lewis had been observed by postal inspectors removing the contents of mail routed through his work station on two separate occasions. See *id.* Obstruction of the mails generally requires that the defendant "knowingly and willfully obstruct[] or retard[] the passage of the mail, or any carrier or conveyance carrying the mail." 18 U.S.C. § 1701 (1994).

23. See 18 U.S.C. § 1701.

24. See *id.* § 3571(b)(6).

25. See *Lewis*, 116 S. Ct. at 2165.

26. See *id.*

27. See *United States v. Lewis*, 65 F.3d 252, 253 (2d Cir. 1995), *aff'd*, 116 S. Ct. 2163 (1996).

28. See *Lewis*, 116 S. Ct. at 2165.

29. See *id.* at 2166.

30. See *Lewis v. United States*, 116 S. Ct. 807 (1996).

31. See *Lewis*, 116 S. Ct. at 2168. Justice O'Connor wrote the majority opinion, and was joined by Chief Justice Rehnquist and Justices Scalia, Souter, and Thomas. See *id.* at 2165.

32. See *id.* at 2166-67.

33. See *id.* at 2167.

34. See *id.* at 2168.

than six months in prison.³⁵ The concurrence argued that in such a situation, a defendant does not face the stigma associated with a serious offense, and thus is not entitled to a trial by jury.³⁶ The concurrence, however, charged that the majority's rationale would enable prosecutors to routinely circumvent a defendant's jury trial right while simultaneously seeking to impose serious penalties upon the defendant.³⁷

Justices Stevens, with whom Justice Ginsburg joined, dissented from the Court's holding, agreeing with the concurrence that the Court had done great damage to the right to a jury trial.³⁸ The dissent, however, disagreed with the concurrence's assertion that Lewis was properly denied a trial by jury because of the pretrial commitment of the trial judge.³⁹ The dissent argued that the right to a trial by jury attaches when the prosecution commences, and that a defendant charged with multiple petty offenses has an absolute right to a trial by jury when facing, in the aggregate, more than six months in prison.⁴⁰

This Note will explore the history of the right to a trial by jury, trace the development of the petty offense doctrine, and discuss those cases where aggregation of petty offenses has been allowed. This Note then examines the holding, concurrence, and dissent in *Lewis*, and argues that the Court's holding, albeit logically sound and an appropriate balance of competing interests, could effectively subject petty offenders to prison terms usually reserved for serious offenders. While recognizing that the *Lewis* holding settles the issue of aggregation of prison terms for petty offenses, this Note suggests that jurisprudential issues remain with respect to the effect on the jury trial right of additional statutory penalties that can be imposed for petty offenses. Finally, this Note proposes that aggregation can be resurrected in the limited context of post-conviction appeals for reduction of sentences.

35. See *id.* at 2169 (Kennedy, J., concurring in judgment).

36. See *id.* at 2172-73.

37. See *id.* at 2171-72. The concurrence stated that this was possible because the Court's holding would allow a prosecutor to divide a serious charge into several petty charges. See *id.* After dividing the charges in that manner, the concurrence argued that the prosecutor could then seek to imprison the defendant for longer than six months. See *id.* This would allow a defendant to be sentenced to serious prison time without the protection of a jury trial. See *id.*; cf. *People v. Estevez*, 622 N.Y.S.2d 870, 876 (Crim. Ct. 1995) (reasoning that a prosecutor could not seek to impose consecutive sentences for several petty offenses after having reduced those charges from serious to petty offenses).

38. See *Lewis*, 116 S. Ct. at 2173 (Stevens, J., dissenting).

39. See *id.*

40. See *id.* at 2173-74.

I. CREEPING TOWARD THE BRIGHT LINE: THE RIGHT TO A TRIAL BY JURY AND THE PETTY OFFENSE EXCEPTION

The right to a trial by jury has deep historical roots in American jurisprudence.⁴¹ Despite memorialization of this right in the United States Constitution,⁴² there exists a long recognized limitation to this guarantee.⁴³ This limitation, created by the common law and endorsed by the Supreme Court, seeks to balance an accused's right to be tried before an impartial jury with the state's obligation to efficiently manage the criminal justice system.⁴⁴

A. *The Historical Development of the Right to a Trial by Jury*

The origin of the right to a trial by jury can be traced back to England, before the enactment of the English Declaration and Bill of Rights⁴⁵ in 1688.⁴⁶ Juries developed in England not only to counterbalance the sovereign's power to appoint judges and prosecute offenses, but also to pre-

41. See ORDINANCE OF 1787: THE NORTHWEST TERRITORIAL GOVERNMENT art. II (U.S. 1787) (giving the citizens of the Ohio territory the right to a trial by jury); THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776) (charging that the English King had "depriv[ed] [them] in many cases, of the benefits of Trial by Jury"); *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968) (discussing the historical development of the right to a trial by jury).

42. See U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI.

43. See *Callan v. Wilson*, 127 U.S. 540, 555 (1888) (recognizing the historical roots of the petty offense doctrine).

44. See *Duncan*, 391 U.S. at 160. But see *INS v. Chadha*, 462 U.S. 919, 944 (1983) ("[T]he fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution."); see also THE FEDERALIST NO. 81, at 409 (Alexander Hamilton) (Buccaneer Books 1992) ("[T]he constitution ought to be the standard of construction for the laws, and that wherever there is an evident opposition, the laws ought to give place to the constitution.").

45. 1 W. & M., sess. 2, ch. 2 (1688), reprinted in 10 HALSBURY'S STATUTES OF ENGLAND AND WALES 32 (4th ed. 1995) [hereinafter HALSBURY'S STATUTES]. The right to a jury trial is affirmed in section 11 of the English Bill of Rights, which states, "[t]hat jurors ought to be duly impanelled and returned." *Id.* at 34.

46. See *id.* Although expressly found in the English Bill of Rights, the right to a trial by jury is also arguably found in the Magna Carta. Chapter 39 of the Magna Carta states, "[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." MAGNA CARTA, ch. 39 (1215), reprinted in, A.E. DICK HOWARD, MAGNA CARTA: TEXT AND COMMENTARY 43 (1964). Scholars, however, have criticized the view that the right to a trial by jury originated in the Magna Carta. See Frankfurter & Corcoran, *supra* note 1, at 922-24 (calling the contention that the trial by jury derived from the Magna Carta, "one of the most revered of legal fables"). Still other scholars have traced the right to a trial by jury back even further, to the reign of King Henry II in the late 12th Century. See THOMAS PITT TASWELL-LANGMEAD, ENGLISH CONSTITUTIONAL HISTORY 71 (Philip A. Ashworth ed., 6th ed. 1992) (attributing the "Grand Assize," or trial by jury, to the reforms of King Henry II in the late 12th century).

vent government oppression.⁴⁷ The English Colonies in America

47. See 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *349-50. In modern England, a defendant has a right to a trial by jury in criminal cases where the Crown charges the defendant by indictment. See 26 LORD HAILSHAM OF ST. MARYLEBONE, HALSBURY'S LAWS OF ENGLAND para. 618 (4th ed. 1979)[hereinafter HAILSHAM]. Indictments may not be sought for crimes for which courts of summary jurisdiction have exclusive jurisdiction. See 11(2) HAILSHAM, *supra*, para. 914. These crimes cannot be tried by jury. See *id.*; 26 HAILSHAM, *supra*, para. 618. For example, taking or destroying game or rabbits by night, or entering property for that purpose is triable summarily. See Night Poaching Act, 1828, 9 Geo. 4, ch. 69, § 1 (Eng.), reprinted in 2 HALSBURY'S STATUTES, *supra* note 45, at 144-45. Wilfully and maliciously diverting or impeding the delivery of mail is tried summarily. See Post Office Act, 1953, 1 & 2 Eliz. 2, ch. 36, § 56(1)(Eng.), reprinted in 34 HALSBURY'S STATUTES, *supra* note 45, at 418. Assault on a constable or a person assisting the constable in the course of executing his or her duties must be tried summarily. See Police Act, 1964, ch. 48, § 51(1)(Eng.), reprinted in 33 HALSBURY'S STATUTES, *supra* note 45, at 707. Resisting or wilfully obstructing a constable or a person helping a constable in the course of executing his or her duties is also tried summarily. See *id.* § 51(3). In addition, allowing a person between the ages of four and sixteen, for whom one has a caretaking responsibility, to reside in or frequent a brothel is tried summarily. See Children and Young Persons Act, 1933, 23 Geo. 5, ch. 12, § 3(1)(Eng.), reprinted in 6 HALSBURY'S STATUTES, *supra* note 45, at 24.

There are some offenses that may be tried "either way," summarily or by indictment. See 11(2) HAILSHAM, *supra*, para. 803(3). Such offenses include, among others:

- (1) offences at common law of public nuisance;
- (2) appearing to be the keeper of a bawdy house etc;
- ...;
- (6) disclosing or intercepting messages;
- (7) entering into transactions intended to defraud creditors;
- ...;
- (9) making false returns under the Corn Returns Act of 1882;
- (10) injuring works with intent to cut off electricity supply;
- (11) damaging submarine cables;
- ...;
- (17) disclosing census information;
- (18) making an untrue statement for the purposes of procuring a passport;
- ...;
- (23) procuring others to commit homosexual acts;
- ...;
- (27) committing an indecent assault upon a person, whether male or female;
- (28) aiding, abetting, counselling or procuring the commission of any offence listed in heads (1) to (27) above except head (22) above . . .

Id. para. 804 (footnotes omitted).

In determining whether the offense should be tried summarily or on an indictment, a court must consider many factors, including:

- (1) the nature of the case;
- (2) whether the circumstances make the offence one of serious character;
- (3) whether the punishment which a magistrates' court would have power to inflict for it would be adequate; and
- (4) any other circumstances which appear to the court to make it more suitable for the offence to be tried in one way rather than the other, and any representations made by the prosecutor or the accused, the offence appears to the court more suitable for summary trial or for trial on indictment

demanded this same right prior to gaining independence from England,⁴⁸ and adopted it almost immediately thereafter in the Constitution.⁴⁹ Although a vast majority of the states allowed for a trial by jury in most serious criminal offenses,⁵⁰ the Sixth Amendment's guarantee of a trial by

Id. para. 811. If the court determines that it is more appropriate to try the offense summarily, the court must explain to the defendant the reasons for, and the potential consequences of, this decision. *See id.* para. 812. The accused must be asked if he or she consents to summary trial. *See id.* If the accused agrees to proceed summarily, he or she is promptly tried. *See id.* If the accused does not consent to summary trial, the court must then proceed to inquire whether there is sufficient evidence to indict the accused for that offense. *See id.* If there is insufficient evidence to indict the defendant, the magistrate must dismiss the charge. *See id.* paras. 801, 872. If there is sufficient evidence to indict the accused, the magistrate judge must commit the accused to be tried by a jury. *See id.* para. 872.

A person summarily convicted of an offense triable either way can be sentenced to not more than six months in prison or a fine of not more than £2,000, or both, unless the statute proscribing that offense specifies a longer prison term or larger fine. *See id.* paras. 807, 819.

48. *See Duncan*, 391 U.S. at 152 (discussing the First Continental Congress's demand that the English authorities provide colonists accused of crimes the right to a trial by jury); *see also* KERMIT L. HALL, ET. AL, *AMERICAN LEGAL HISTORY: CASES AND MATERIALS* 60-61, 64-65 (2d ed. 1996) (discussing the demand of the English colonists to be accorded the same rights as those persons living in England, and the demand of the First Continental Congress that all colonists be accorded the right to a trial by jury).

The desire to have a trial by jury in the English colonies was not always observed in practice. The Laws and Liberties of Massachusetts set forth the judicial system of the Massachusetts colony:

That no man's life shall be taken away; no man's honor or good name shall be stained; no man's person shall be arrested, restrained, banished, dismembered nor any ways punished; no man shall be deprived of his wife or children; no man's goods or estate shall be taken away from him; nor any ways damaged under color of Law or countenance of Authority unless it be by the virtue or equity of some express law of the County warranting the same established by a General Court & sufficiently published; or in case of the defect of a law in any particular case by the word of God. And in capital cases, or cases concerning dismembring or banishment according to that word to be judged by the General Court.

THE BOOK OF THE GENERAL LAVVES AND LIBERTYES CONCERNING &C, (1648), *reprinted in* HALL, ET AL., *supra*, at 17 (setting forth a court system without expressly mentioning a trial by jury). *See generally* LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 29-42 (1973) (suggesting that the structure of early colonial courts differed from the English common law courts because of the necessities of colonial life and the varying structures and citizenship of the individual colonies); Frankfurter & Corcoran, *supra* note 1, at 938-42 (discussing the propensity in colonial Massachusetts to try offenses summarily).

49. *See* U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI.

50. *See Duncan*, 391 U.S. at 153-54 (discussing that the original thirteen colonies all adopted in their state constitutions the right to a jury trial, that all States guaranteed a right to a jury trial for serious crimes, and that the right to a jury trial continued to receive strong legislative and public support).

jury was not made applicable to the states through the Fourteenth Amendment until 1968.⁵¹

B. *The Petty Offense Exception*

Despite explicit constitutional language guaranteeing a trial by jury in criminal prosecutions,⁵² it has long been acknowledged that there is a category of "petty" offenses to which no right to a trial by jury attaches.⁵³ The exception to the right to a jury trial finds its source in the English common law courts.⁵⁴ Early colonial law recognized the exception, and it continued after the United States gained independence from England.⁵⁵

51. See *id.* at 156 (finding that the right to a trial by jury was fundamental to our system of justice because it prevented the arbitrary exercise of official power, and, therefore, qualified the right for protection by the Due Process Clause of the Fourteenth Amendment).

52. See U.S. CONST. art. III, § 2, cl. 3; *id.* amend. VI. Courts have long recognized, however, that constitutional language is not, in and of itself, the final answer to a question. See *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925) ("The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."); *Thompson v. Utah*, 170 U.S. 343, 350 (1898) ("It must . . . be taken that . . . the words 'trial by jury' were placed in the Constitution . . . with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument.").

53. See *Duncan*, 391 U.S. at 160 (noting the long history of trying petty offenses without a jury, and finding no substantial evidence that the Framers of the Constitution intended to change this practice); *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937) (stating that the Sixth Amendment trial by jury guarantee does not apply to petty offenses); *District of Columbia v. Colts*, 282 U.S. 63, 72 (1930) (recognizing that it was an established principle of law that petty offenses could be tried without a jury); *Schick v. United States*, 195 U.S. 65, 70 (1904) (finding it "obvious" that the Framers of the Constitution intended for the exclusion of petty offenses from the jury trial guarantee); *Natal v. Louisiana*, 139 U.S. 621, 624 (1891) ("[P]etty offenses . . . may be punished by summary proceedings before a magistrate, without a trial by jury."); *Callan v. Wilson*, 127 U.S. 540, 555 (1888) (discussing the presence at common law of a category of offenses so minor that they may, "under the authority of Congress," be tried without a jury); *State v. Rodgers*, 102 A. 433, 434 (N.J. 1917) (stating that the legislature had the power to define an offense as petty and to make it triable without a jury).

54. See *Duncan*, 391 U.S. at 160 (discussing the practice in England of trying similar offenses before a judge or magistrate only); *Clawans*, 300 U.S. at 624 (same); *Callan*, 127 U.S. at 552 (same). See generally Frankfurter & Corcoran, *supra* note 1, at 925-34 (discussing the general abandonment of an absolute jury trial right in England, in favor of trying certain "petty" offenses before magistrates because of the great burden that the trial by jury places upon the judicial system).

55. See *Duncan*, 391 U.S. at 160 (stating that there was no evidence suggesting the Framers of the Constitution wished to change the practice of trying petty offenses without a jury); *Clawans*, 300 U.S. at 624 (noting that at the time of the enactment of the Constitution, the practice of trying petty offenses without a jury was a very common one); *Callan*, 127 U.S. at 552-53 (discussing American cases applying the petty offense exception). See generally Frankfurter & Corcoran, *supra* note 1, at 934-65 (discussing the laws of the various colonies and States of the United States and how they reflected their common law

Courts originally looked to whether an offense was indictable⁵⁶ at common law to determine if it was petty or serious for purposes of the Sixth Amendment.⁵⁷ If the offense was not indictable at common law, it was presumed petty and could be tried without a jury.⁵⁸ Over time, however, an increasing number of criminal statutes provided for new crimes that had no equivalents at common law,⁵⁹ and in some cases, reduced or increased the severity with which common law crimes were treated.⁶⁰

heritage with England by maintaining a class of petty offenses that were triable without a jury).

56. An indictment is a written accusation, presented by a grand jury, charging a person with committing a crime. See *Salvail v. Sharkey*, 271 A.2d 814, 817 (R.I. 1970); see also BLACK'S LAW DICTIONARY 772 (6th ed. 1990)[hereinafter BLACK'S]. At common law, offenses that were cognizable as *malum in se* were required to be brought by indictment. See *Rodgers*, 102 A. at 434; see also *Colts*, 282 U.S. at 73. *Malum in se* is defined as an act being inherently evil and immoral, without respect to statutory enactment. See *Grindstaff v. State*, 377 S.W.2d 921, 926 (Tenn. 1964); *State v. Shedoudy*, 118 P.2d 280, 286 (N.M. 1941); *State v. Horton*, 51 S.E. 945, 946 (N.C. 1905), BLACK'S, *supra*, at 959. An offense that is *malum prohibitum* is a wrong that is not inherently immoral, but one that is expressly proscribed by law. See *Horton*, 51 S.E. at 946; see also BLACK'S, *supra*, at 960; 1 WAYNE R. LAFAYE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 1.6(b), at 45 (1986). At common law, offenses that were characterized as being *malum prohibitum* could be charged by information. Cf. *Colts*, 282 U.S. at 73. An information is made by a public officer, not a grand jury, and serves to inform the defendant of the charge against him or her. See *Salvail*, 271 A.2d at 817; see also BLACK'S, *supra*, at 79; 2 CHARLES E. TORCIA, WHARTON'S CRIMINAL PROCEDURE § 206, at 6-9 (13th ed. 1990).

Under the Federal Rules of Criminal Procedure, offenses for which the penalty is death, hard labor, or a prison term of more than one year must be brought by indictment. See FED. R. CRIM. P. 7(a). Any offense carrying a lesser penalty may be brought by either an indictment or by information. See *id.* If the defendant, having been advised of the nature of the charge and his or her rights, waives in open court the right to an indictment, an offense that would otherwise be required to be brought by indictment may be brought by information. See *id.* 7(b). An indictment or information must be "a plain, concise and definitive written statement of the essential facts constituting the offense charged." *Id.* 7(c).

57. See *Clawans*, 300 U.S. at 625.

58. See *id.*; *Schick v. United States*, 195 U.S. 63, 68 (1930) (finding that the charges before the Court were petty and could be charged by information).

59. See *Clawans*, 300 U.S. at 625-27.

60. See *id.* The debate as to the common law's effect on current statutory law continues to the present time. See *Day v. United States*, 682 A.2d 1125 (D.C. 1996). In *Day*, the defendant, having been convicted of assault, appealed the trial court's denial of a trial by jury based on the fact that assault was tried by jury at common law. See *id.* at 1128. The court of appeals rejected this argument, stating that courts would look to the common law only to determine the seriousness of an offense in the absence of a statute. See *id.* at 1129 (citing *Linkins v. Protestant Episcopal Cathedral Found.*, 187 F.2d 357, 360 (D.C. Cir. 1950)). The court found that statutes have "explicitly modified or abrogated the common law . . . [which] continues to develop," and that arguments that the common law controlled the right to a jury trial were incorrect in that such arguments did not recognize the ability of a statute to supersede the common law. *Day*, 682 A.2d at 1129 (citing *Linkins*, 187 F.2d at 360). It is not how society once viewed a particular offense, but how society now views that offense, that determines whether the offense is triable by jury. See *id.*

Courts, therefore, found it necessary to look to the laws and practices of the nation for objective criteria that demonstrated the severity of a particular crime.⁶¹

In deciding whether a defendant was entitled to a trial by jury, courts determined that the most important objective factor that demonstrates the severity of a crime is the statutory penalty authorized by the legislature.⁶² Although the prescribed amount of time spent in prison was the most important factor considered, fines and other punishments authorized by the legislature were also objective factors given thoughtful consideration.⁶³

The early cases regarding the right to a trial by jury in petty offense cases were decided in federal jurisdictions, such as the District of Columbia.⁶⁴ Consequently, tension arose when the federal courts applied the Sixth Amendment's jury trial right and the attendant petty offense exception to the states.⁶⁵ In *Duncan v. Louisiana*,⁶⁶ the defendant was convicted of one count of simple battery without the benefit of a trial by jury.⁶⁷ In Louisiana, simple battery carried a maximum sentence of two years in prison.⁶⁸ After determining that the right to a trial by jury was fundamental to our system of justice,⁶⁹ the *Duncan* Court looked to ob-

61. See *Clawans*, 300 U.S. at 628.

62. See *id.*

63. See *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989) (reasoning that there may be some cases where additional statutory penalties that are authorized for an offense are so severe as to change the classification of an offense from petty to serious).

64. See *Clawans*, 300 U.S. at 623-24 (holding that a defendant charged with engaging in the business of dealing in secondhand property without a license in the District of Columbia was not entitled to a trial by jury because the offense was petty in nature); *Callan v. Wilson*, 127 U.S. 540, 555 (1888) (deciding that a defendant charged with the crime of conspiracy in the District of Columbia was entitled to a trial by jury because the offense was serious in nature).

65. See *Duncan v. Louisiana*, 391 U.S. 145, 149-50 & n.14 (1968). The tension arose primarily out of the long running dispute as to whether the first eight amendments to the Constitution were "incorporated" through the Fourteenth Amendment as applicable to the states. See *id.* Early approaches to this conflict asked whether the right guaranteed by one of the first eight amendments was essential to a scheme of ordered liberty. See *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). The *Duncan* Court noted that more recent cases had phrased the test as being whether the procedure in question was "necessary to [a] . . . regime of ordered liberty." *Duncan*, 391 U.S. at 150 n.14.

66. 391 U.S. 145 (1968).

67. See *id.* at 147.

68. See *id.* at 146.

69. See *id.* at 156. It was necessary to conclude that the right to a trial by jury was fundamental in our system of justice, as only then could the Court make that right applicable to the states through the Fourteenth Amendment. See *id.* at 149-50. Whether the right was "fundamental in our system of justice" was but one of a number of phrasings used to describe the tests relied upon to incorporate and apply the Bill of Rights to the States through the Fourteenth Amendment. See, e.g., *Pointer v. Texas*, 380 U.S. 400, 403 (1965)

jective criteria to determine whether an offense that carried a maximum sentence of two years in prison was serious for purposes of triggering the Sixth Amendment jury trial protection.⁷⁰

The Court noted that federal law defined petty offenses as those crimes punishable by no more than six months in prison and a \$500 fine.⁷¹ The Court also recognized that forty-nine of the fifty states permitted jury trials for individuals charged with crimes carrying more than one year in prison,⁷² and that it was common practice in late 18th century America for individuals charged with crimes punishable by no more than six months in prison to be denied the right to a jury trial.⁷³ Relying on these objective criteria, the Court held that a crime carrying a potential prison term of two years constituted a serious offense, and therefore the severity of the charged offense entitled the defendants to a trial by jury.⁷⁴

C. Refinement of the "Petty" and "Serious" Dividing Line

Although the existence of petty offenses was long recognized, prior to the *Duncan* decision, courts had declined to draw a bright line distinction between petty and serious offenses.⁷⁵ Soon after *Duncan*, however, the

(holding that the right of an accused to confront witnesses against him was "fundamental and essential to a fair trial"); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964) (holding that the right against self-incrimination was "a fundamental right, essential to a fair trial"); *Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963) (the right to counsel is "fundamental and essential to a fair trial"); *In re Oliver*, 333 U.S. 257, 273 (1948) ("[The] right to reasonable notice of [the] charge against him, and an opportunity to be heard in his defense . . . [is] basic in our system of jurisprudence."); *Powell v. Alabama*, 287 U.S. 45, 67 (1932) (asking whether the right to counsel was one of "those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'"); *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926) (stating that the Due Process Clause of the Fourteenth Amendment requires that state action "be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions").

70. See *Duncan*, 391 U.S. at 159-60 (citing *District of Columbia v. Clawans*, 300 U.S. 617, 628 (1937)).

71. See *id.* at 161. This definition relied on the old petty offense statute. See 18 U.S.C. § 1(3)(1964) (repealed 1987). That statute has now been repealed, and although the six month maximum remains the dividing line for a petty offense, fines up to \$5,000 are now permissible as punishment for petty offenses committed by individuals. See 18 U.S.C. § 19 (1994); *id.* § 3571(b)(6)-(7). The congressional intent to make these fines correspond with existing law so as to make them petty can be found in the legislative history of the Criminal Fines Improvements Act of 1987. See H.R. REP. NO. 100-390, at 5-6 (1987), *reprinted in* 1987 U.S.C.A.A.N. at 2141-42.

72. See *Duncan*, 391 U.S. at 161.

73. See *id.*

74. See *id.* at 161-62.

75. See *id.* at 160-61 (declining to hold that a six month prison sentence was the dividing line between petty and serious offenses).

Supreme Court began to define more exactly the difference between petty and serious offenses.⁷⁶

1. *Evaluation of Statutory Penalties: Greater Than Six Months*

Offenses carrying more than six months in prison are defined as serious, and defendants charged with committing them have an absolute right to a trial by jury.⁷⁷ In *Baldwin v. New York*,⁷⁸ the defendant had been

76. See *Lewis v. United States*, 116 S. Ct. 2163, 2168 (1996) (holding that two petty offenses could not be aggregated to guarantee a jury trial); *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989) (holding that a crime carrying no more than six months of incarceration was presumptively petty); *Baldwin v. New York*, 399 U.S. 66, 69 (1970) (plurality opinion) (holding that a crime carrying more than six months in prison was a serious offense).

77. See *Baldwin*, 399 U.S. at 69. The distinction between petty and serious crimes is not the same as the difference between misdemeanors and felonies. See *id.* at 70. The *Baldwin* Court traced that distinction back almost 100 years, stating that many misdemeanors were, in fact, considered serious by the legislature. See *id.* (citing *Callan v. Wilson*, 127 U.S. 540, 549 (1888)).

Under the current federal offense classification scheme, petty offenses can be grouped into Class B and C misdemeanors and infractions. See 18 U.S.C. § 3559(a)(7)-(9) (1994). Class B misdemeanors are punishable by prison sentences of more than thirty days but no more than six months. See *id.* § 3559(a)(7). Class C misdemeanors are punishable by prison sentences of more than five days but no more than thirty days. See *id.* § 3559(a)(8). Infractions are punishable by no more than five days in prison. See *id.* § 3559(a)(9). Provided the crime does not result in death, Class B and C misdemeanors may be assessed fines of no more than \$5,000. See *id.* § 3571(b)(6). Infractions may be assessed fines of no more than \$5,000. See *id.* § 3571(b)(7). Class A misdemeanors are punishable by no less than six months in prison but not greater than one year in prison. See *id.* § 3559(a)(6). Class A misdemeanors that do not result in death are punishable by fines not greater than \$100,000. See *id.* § 3571(b)(5). Thus defined, Class A misdemeanors in the federal classification scheme qualify as serious offenses under the standard promulgated in *Baldwin*. See *Baldwin*, 399 U.S. at 70-72.

It should be noted that the states are free to define, if at all, petty offenses differently than the federal government, so long as they do not provide punishments more severe than those provided in the federal classification scheme. See, e.g., ARIZ. REV. STAT. ANN. § 13-105(27) (West Supp. 1996) ("Petty offense" means an offense for which a sentence of a fine only is authorized."); COLO. REV. STAT. § 16-10-109(1)-(2) (1986 & Supp. 1996) (defining petty offenses as carrying no more than six months in prison and a \$500 fine, and providing defendants charged with petty offenses the right to a jury trial before a jury of up to six persons); COLO. REV. STAT. § 18-1-107 (Supp. 1996) (dividing petty offenses into two classes, one carrying no more than six months in prison and a \$500 fine, and the other carrying a fine only); CONN. GEN. STAT. ANN. § 54-82b(a) (West 1994) (providing no jury trial for offenses for which the maximum penalty is a fine of \$199); D.C. CODE ANN. § 16-705(b)(1) (Michie Supp. 1996) (providing no jury trial right to defendants charged with offenses carrying less than six months in prison or a maximum fine of \$1,000); FLA. STAT. ANN. § 918.0157 (West 1996) (providing no jury trial right for offenses carrying no more than six months in prison); 730 ILL. COMP. STAT. ANN. § 5/5-1-17 (West 1992) (defining a petty offense as an offense for which fines only can be imposed); MD. CODE ANN. 4-102(h)(1996) (defining petty offenses as carrying not more than three months in prison or a \$500 fine); MINN. STAT. ANN. § 609.02.4a (West Supp. 1997) (classifying petty offenses as

tried and convicted of pickpocketing⁷⁹—a crime having a maximum penalty of one year in prison.⁸⁰

After surveying existing law, the Court in *Baldwin* determined that crimes carrying more than six months in prison are considered “serious” offenses.⁸¹ The Court then noted that, in the federal judicial system, a petty offense was punishable by no more than six months in prison and a \$500 fine.⁸² Upon review of state and local laws, the Court found that only New York City allowed its courts to deny a jury trial to defendants facing more than six months incarceration.⁸³ The Court overruled this practice, holding that defendants tried for offenses carrying more than six months in prison were entitled to a trial by jury.⁸⁴

2. Evaluation of Statutory Penalties: Six Months or Less

Offenses carrying less than a six month prison term are presumed to be petty.⁸⁵ The presumption can be rebutted only if a defendant shows that additional statutory penalties, when combined with the maximum prison term, are severe enough to demonstrate that the legislature intended the offense to be serious.⁸⁶ In *Blanton v. City of North Las Vegas*,⁸⁷ first-time Driving Under the Influence (DUI) offenders could receive a sentence of no more than six months in prison, or in the alternative, forty-eight hours

offenses that are prohibited by statute but are not crimes, and that carry a sentence of no more than \$200); N.J. STAT. ANN. § 2C:1-4 (West 1995) (defining petty offenses as carrying no more than six months in prison and “not within the Constitution of this State,” and therefore not entitled to a jury trial).

78. 399 U.S. 66 (1970).

79. *See id.* at 67 & n.1. The statute labeled this offense “jostling,” and was New York’s attempt to deal with pickpocketers. *See id.* at 67 n.1.

80. *See id.* at 67.

81. *See id.* at 69.

82. *See id.* at 70-71 (citing 18 U.S.C. § 1(3)); *see also supra* note 71 and accompanying text (discussing the *Duncan* holding and the definition of petty offenses at the federal level).

83. *See Baldwin*, 399 U.S. at 71-72.

84. *See id.* at 69. The Court was unable to agree on whether a defendant had a jury trial right when charged with an offense carrying not more than six months in prison. The plurality of Justices White, Brennan, and Marshall would have held that defendants charged with offenses carrying less than six months in prison did not have a jury trial right. *See id.* at 73. Justice Black, joined by Justice Douglas, concurred because they believed Baldwin had a right to a jury trial; however, they argued that the right attached in “all crimes” and “criminal prosecutions,” and thus, that the Constitution did not fathom the petty offense exception as the plurality would have held. *See id.* at 74-76 (Black and Douglas, JJ., concurring in judgment).

85. *See Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989).

86. *See id.*

87. 489 U.S. 538 (1989).

of public service dressed in clothing that identified the person as a DUI offender.⁸⁸

The *Blanton* Court held that, for purposes of determining whether a defendant was entitled to a trial by jury, all crimes that carried sentences of no greater than six months in prison were presumed to be "petty" in nature.⁸⁹ The Court explained that a defendant could rebut this presumption by demonstrating that additional legislative penalties, when coupled with the maximum prison sentence, were so severe as to indicate that the legislature viewed the crime as a serious offense.⁹⁰ In *Blanton*, the Court found that the maximum six month prison sentence made the DUI charge presumptively petty.⁹¹ The Court then evaluated the additional statutory penalties, and reasoned that the stigma associated with the alternate sentence of having to dress as a DUI offender was not so severe as to indicate that the legislature considered the offense as seri-

88. *See id.* at 539.

89. *See id.* at 543.

90. *See id.* Only statutory penalties by the legislature are considered in determining whether the legislature viewed the offense as serious in nature. *See id.* at 543 n.8 (citing Note, *The Federal Constitutional Right to Trial by Jury for the Offense of Driving While Intoxicated*, 73 MINN. L. REV. 122, 149-50 (1988)).

91. *See Blanton*, 489 U.S. at 543-44.

ous.⁹² The Court, therefore, held that the petitioners were not entitled to a trial by jury.⁹³

92. See *id.* at 544. The maximum fine of \$1,000 and mandatory 90-day suspension of the offender's drivers license also were held to be insufficient to characterize the offense as serious. See *id.* The *Blanton* Court made this portion of the petty offense doctrine flexible in recognition that in some limited instances, significant statutory penalties would be attached to an offense that did not carry more than six months in prison. See *id.* at 543.

A third-time driving while under the influence of alcohol (DWI) offender, who was eligible for a maximum of six months in prison and a mandatory 15-year suspension of his driver's license, was entitled to a trial by jury because the penalty showed that the legislature had determined the offense to be serious. See *Richter v. Fairbanks*, 903 F.2d 1202, 1204 (8th Cir. 1990). In *Richter*, Nebraska had set the penalty for a third-time DWI offense as three to six months in prison, a mandatory 15-year suspension of the offender's driver's license, and a \$500 fine. See *id.* at 1203. In this case, a county court had jurisdiction to try the offense, and that court denied the defendant a jury trial. See *id.* *Richter* was tried and convicted as a third-time DWI offender and for refusing to take a breathalyzer test. See *id.*

Relying on the flexibility of the petty offense doctrine set forth by the Supreme Court in *Blanton*, the Eighth Circuit held that the 15-year license suspension, when combined with the maximum prison sentence, was exactly the sort of penalty that the *Blanton* Court would have considered "serious" when viewed along with the maximum prison sentence. See *id.* at 1205. The court held that the deprivation of a motor vehicle license, in almost any circumstance, would work a significant hardship on the driver. See *id.* at 1204. Upon reaching this conclusion, the court held that a 15-year suspension sufficiently demonstrated that the Nebraska legislature considered a third-time DWI offense a serious crime, and that the defendant charged with its commission was entitled to a trial by jury. See *id.* at 1205.

The *Richter* decision is the only one of its kind, as courts have routinely upheld various additional statutory penalties. Discretionary terms of probation that include payment of restitution, participation in drug and alcohol dependency programs, residence at a facility while undergoing drug and alcohol dependency counseling, weekend stays in the custody of the Bureau of Prisons, participation or residing at a community correctional facility, and electronic monitoring do not rebut the presumption that DUI is a petty offense. See *United States v. Nachtigal*, 507 U.S. 1, 5-6 & n.* (1993). A defendant charged with a first offense DUI was not entitled to a trial by jury when the statutory penalties included a six month prison term, a fine of between \$250 and \$500, a term of probation of not more than one year, 50 hours of community service, and enrollment in a substance abuse program at defendant's expense. See *United States v. Garner*, 874 F.2d 1510, 1511-12 (11th Cir. 1989). Defendants charged with cocaine possession were not entitled to a trial by jury when the additional statutory penalties included eligibility for recidivist penalties and revocation of probation imposed in a prior cocaine possession conviction. See *Brown v. United States*, 675 A.2d 953, 954-55 (D.C. 1996). The fact that the charge of cocaine possession was a serious offense under federal law was not important in determining whether the local legislature considered the offense to be serious or petty. See *id.* Additionally, civil or administrative actions that might be brought against a person charged with multiple petty offenses did not entitle that defendant to a trial by jury. See *Foote v. United States*, 670 A.2d 366, 372 (D.C. 1996).

93. See *Blanton*, 489 U.S. at 545. See generally L.S. Groff, Annotation, *Right to Trial by Jury in Criminal Prosecution for Driving While Intoxicated or Similar Offense*, 16 A.L.R.3d 1373, § 3[b] (Supp. 1996) (discussing the *Blanton* holding).

3. *The Right to a Trial By Jury In the Absence of a Statutorily Authorized Maximum Sentence*

To determine the severity of an offense for which there is no statutory maximum penalty, courts look to the length of the sentence imposed on a defendant.⁹⁴ If a sentence of greater than six months is imposed, the defendant is entitled to a trial by jury because the length of the sentence evidences a determination that the offense or offenses were serious in nature.⁹⁵ In *Codispoti v. Pennsylvania*,⁹⁶ the petitioner had been tried and convicted of seven contempts⁹⁷ arising out of his criminal trial, and

94. See *Codispoti v. Pennsylvania*, 418 U.S. 506, 517 (1974) (allowing for jury trials in cases where the length of the sentence actually imposed for multiple contempt of court charges exceeded six months in prison); *Bloom v. Illinois*, 391 U.S. 194, 211 (1968) (deeming it unconstitutional to deny a trial by jury when the sentence imposed was two years incarceration). But see *Taylor v. Hayes*, 418 U.S. 488, 496 (1974) (holding that the defendant was not entitled to a jury trial where the length of the sentence actually imposed for multiple contempt of court charges did not exceed six months in prison); *Frank v. United States*, 395 U.S. 147, 151-52 (1969) (finding that a sentence of three years probation is insufficient to merit a jury trial); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 220 (1968) (holding that ten days in jail and a \$50 fine was not severe enough to merit a jury trial); *Cheff v. Schnackenberg*, 384 U.S. 373, 380 (1966) (holding that a sentence of six months in prison was not severe enough to merit a trial by jury).

95. See *Codispoti*, 418 U.S. at 517.

96. 418 U.S. 506 (1974).

97. Contempt of court is defined in 18 U.S.C. § 401, which states:

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—

- (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
- (2) Misbehavior of any of its officers in their official transactions;
- (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

18 U.S.C. § 401 (1994).

A contempt of court under § 401 is not, by definition, a crime. A contempt of court is a crime if it meets the definition of 18 U.S.C. § 402:

Any person, corporation or association willfully disobeying any lawful writ, process, order, rule, decree, or command of any district court of the United States or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by a fine under this title or imprisonment, or both.

Id. § 402.

Section 402 further adds, "but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of \$1,000, nor shall such imprisonment exceed the term of six months." *Id.* This section does not apply to the contempts specifically enumerated in 18 U.S.C. § 401. See *id.* If the contempt committed conforms to the definition in 18 U.S.C. § 402, however, the defendant may demand a trial by jury. See *id.* § 3691. Moreover, a defendant charged with contempt of court that arises out of an

was sentenced to six months in prison for each of the first six contempts, and three months in prison for the seventh.⁹⁸ The sentences were ordered to run consecutively, for a total sentence of thirty-nine months in prison.⁹⁹

The Court stated that because criminal contempt carries no maximum sentence authorized by statute, it was necessary to evaluate the length of the sentence actually imposed on the defendant in order to determine whether he had been convicted for the equivalent of a serious offense.¹⁰⁰ The Court recognized that the imposition of consecutive sentences for contempt placed the defendant in prison for over three years.¹⁰¹ Because this exceeded the six month demarcation line that automatically guaranteed a defendant a jury trial, the Court held that the petitioner had been tried for the equivalent of a serious offense.¹⁰² Thus, the petitioner was entitled to a trial by jury.¹⁰³

In situations where there is no statutory maximum sentence, and the sentence imposed on the defendant is less than six months, the offense is deemed to be petty in nature and the defendant is not entitled to a trial by jury.¹⁰⁴ In *Taylor v. Hayes*,¹⁰⁵ a lawyer was found guilty of eight charges of contempt and sentenced to a total of six months in prison.¹⁰⁶

injunction or restraining order issued in a case arising from a labor dispute may be entitled to a trial by jury. *See id.* § 3692.

98. *See Codispoti*, 418 U.S. at 509.

99. *See id.* Herbert Langnes was another defendant in the same underlying trial, and his appeal was consolidated with *Codispoti*'s. *See id.* at 507. Langnes had been convicted on six contempt charges and sentenced to 32 months in prison, although the sentence on any one count did not exceed six months in prison. *See id.* at 509-10.

100. *See id.* at 516-17.

101. *See id.* at 516.

102. *See id.* at 517. The Court explicitly rejected the argument that because the sentences imposed on each count were not more than six months, the defendant was not entitled to a trial by jury. *See id.* The Court held that the combination of the sentences and the decision of the trial judge to have those sentences run consecutively extended the actual time in prison beyond that allowed for a petty offense. *See id.* at 516. As these counts were effectively aggregated by the imposition of consecutive sentences, the Court found that the defendant had been tried for the equivalent of a serious offense, thus entitling him to a trial by jury. *See id.* at 516-17.

The Court rejected the notion, however, that a defendant would be entitled to a jury trial if there was a "strong possibility" that the defendant would spend a substantial amount of time in prison, regardless of the actual punishment imposed. *See id.* at 512.

103. *See id.* at 517.

104. *See Taylor v. Hayes*, 418 U.S. 488, 496 (1974).

105. 418 U.S. 488 (1974).

106. *See id.* at 492-93, 495-96. The petitioner had originally been sentenced to 30 days on the first count, 60 days on the second, three months on the third, six months each on counts four through seven, and one year each on the last two counts, all to run consecutively. *See id.* at 490-91. While the petitioner's appeal was pending, the trial judge entered an amended judgment reducing the time in prison on counts seven and eight to six months

Distinguishing *Codispoti*, the Court found that the petitioner in *Taylor* had not been tried for the equivalent of a serious offense because the actual sentence imposed did not exceed six months in prison.¹⁰⁷ *Taylor*, therefore, substantiated the Court's reliance on whether the actual sentence imposed exceeded six months imprisonment.¹⁰⁸

D. The Aggregation Issue

The Supreme Court cases that delineated the difference between petty and serious offenses involved defendants charged with a single count of one offense.¹⁰⁹ The cases that addressed defendants charged with multiple offenses and allowed for the aggregation of the penalties, however, arose from criminal contempt charges, for which no statutory maximum sentence existed.¹¹⁰ The disparity between these two factual scenarios caused disagreement in the lower courts as to whether a defendant charged with multiple petty offenses was entitled to a trial by jury.¹¹¹

each, and reducing the first count to a warning. *See id.* at 492-93. The amended judgment was silent as to whether the sentences were to be served concurrently or consecutively, and the Kentucky Court of Appeals and the United States Supreme Court construed this silence as imposing concurrent sentences for all counts. *See id.* at 493, 495-96.

107. *See id.* at 496.

108. *See id.*

109. *See* *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 540 (1989) (holding one count of driving under the influence of alcohol to be petty in nature); *Baldwin v. New York*, 399 U.S. 66, 67 (1970) (describing a single count of "jostling"—a crime with a maximum one year prison term—as serious).

110. *Compare* *Codispoti v. Pennsylvania*, 418 U.S. 506, 511, 516-17 (1974) (finding the aggregation of the defendants' multiple charges of criminal contempt to be serious), *with Taylor*, 418 U.S. at 492-93, 495-96 (denying a jury trial to a defendant convicted of eight counts of criminal contempt where sentenced to only six months incarceration).

111. *See* *United States v. Coppins*, 953 F.2d 86, 90 (4th Cir. 1991) (holding that defendants charged with multiple petty offenses arising out of the same criminal transaction could aggregate their sentences to secure a trial by jury); *United States v. Bencheck*, 926 F.2d 1512, 1518 (10th Cir. 1991) (noting that defendants charged with multiple petty offenses that individually do not carry more than six months in prison, but in the aggregate do carry potentially more than six months in prison, are entitled to a trial by jury); *Rife v. God-behere*, 814 F.2d 563, 564-65 (9th Cir. 1987) (holding that where a judge has the discretion, in multiple petty offense cases, to impose a sentence in excess of six months in prison by ordering consecutive sentences, the defendant has a right to a trial by jury); *United States v. Potvin*, 481 F.2d 380, 382 (10th Cir. 1973) (holding that defendants charged with multiple petty offenses arising out of the same act, transaction, or occurrence were entitled to a trial by jury when the aggregate prison term they faced was more than six months); *United States v. Musgrave*, 695 F. Supp. 231, 232-33 (W.D. Va. 1988) (same); *United States v. Coleman*, 664 F. Supp. 548, 549 (D.D.C. 1985) (same); *United States v. O'Connor*, 660 F. Supp. 955, 956 (N.D. Ga. 1987) (same); *State v. Sanchez*, 786 P.2d 42, 46 (N.M. 1990) (same).

But see *United States v. Lewis*, 65 F.3d 252, 254 (2d Cir. 1995), *aff'd*, 116 S. Ct. 2163, 2168 (1996) (holding that defendants charged with multiple petty offenses cannot aggregate the potential total prison sentence they face to secure a trial by jury); *United States v.*

1. Aggregation as a Right in Multiple Petty Offense Trials

The Fourth, Ninth,¹¹² and Tenth Circuit Courts of Appeals permitted a defendant charged with multiple petty offenses arising from the same incident to aggregate the potential prison term to secure a trial by jury.¹¹³ For instance, in *United States v. Coppins*,¹¹⁴ the appellant was charged with three different petty offenses arising from a single criminal incident.¹¹⁵ If the defendant had been sentenced to serve consecutively the maximum term on each of the three counts, she would have spent fifteen months in prison.¹¹⁶ The magistrate judge, however, denied the defendant's request for a trial by jury.¹¹⁷ Ultimately, the defendant was convicted on two of the charges and sentenced to pay a fine of \$170.¹¹⁸

The Fourth Circuit reversed the conviction, relying on the Supreme Court's reasoning in *Codispoti*, which held that where consecutive sentences for contempt of court were imposed, totaling more than six months in prison, the defendant was entitled to a trial by jury.¹¹⁹ The

Brown, 71 F.3d 845, 847 (11th Cir.), *cert. denied*, 116 S. Ct. 2580 (1996) (same); Foote v. United States, 670 A.2d 366, 369 (D.C. 1996) (same); Weber v. City of Fort Lauderdale, 675 So. 2d 696, 699 (Fla. Dist. Ct. App. 1996) (same).

See generally Romualdo P. Eclavea, Annotation, *Right to Jury Trial Under Federal Constitution Where Two or More Petty Offenses, Each Having Penalty of Less than 6 Months' Imprisonment, Have Potential Aggregate Penalty in Excess of 6 Months when Tried Together*, 26 A.L.R. FED. 736, 736-40 (1976 & Supp. 1996) (discussing the history of the petty offense exception, and the emerging split between courts as to whether a defendant charged with multiple petty offenses could aggregate the potential penalty faced to secure a trial by jury).

112. See *infra* note 129 (discussing the aggregation approach of the Ninth Circuit in *Rife v. Godbehere*).

113. See *Coppins*, 953 F.2d at 90 (holding that where a defendant is charged with multiple petty offenses arising from the same incident, the defendant may aggregate the total penalty faced, based on the statutory maximum sentences and the possibility of consecutive sentences being imposed, to secure a trial by jury); *Bencheck*, 926 F.2d at 1518-19 (same); *Rife*, 814 F.2d at 564-65 (same).

114. 953 F.2d 86 (4th Cir. 1991).

115. See *id.* at 87. The appellant, a civilian employee at the Marine Corps Air Station at Cherry Point, North Carolina (MCAS Cherry Point), was charged with one count of trespassing on a military reservation, one count of assault by beating, and one count of simple assault. See *id.* Military Policemen (MPs) stopped the appellant at the gate to MCAS Cherry Point for having an expired base vehicle decal. See *id.* When taken to the guard office to receive a temporary pass, the appellant got into an altercation with two MPs, during which she allegedly grabbed one by the shoulder and struck the other with her purse. See *id.*

116. See *id.* at 87-88. The trespassing and assault by beating charges each carried a maximum term of six months in prison, and the simple assault charge carried a maximum term of three months. See *id.*

117. See *id.* at 88.

118. See *id.* A magistrate judge convicted Coppins for assault by beating and simple assault, but acquitted her of the trespassing charge. See *id.*

119. See *id.* at 90 (citing *Codispoti v. Pennsylvania*, 418 U.S. 506, 516-17 (1974)).

Coppins court adopted an objective standard of aggregation, arguing that courts should consider the potential deprivation of a defendant's liberty in such situations because such defendants face a potential jail term greater than six months if consecutive sentences are imposed.¹²⁰ The court held that, for multiple petty offenses arising out the same criminal transaction, a defendant has a right to a jury trial when the aggregate maximum authorized prison term exceeded six months.¹²¹

Similarly, in *United States v. Bencheck*,¹²² the Tenth Circuit adopted a subjective approach to aggregation, allowing aggregation and trial by jury was allowed only to the extent a defendant actually faced a potential prison sentence of over six months.¹²³ The trial court in *Bencheck* had tried and convicted the appellant of several petty offenses arising from a routine traffic violation.¹²⁴

The trial court denied the defendant's request for a jury trial, promising that the defendant would not be sentenced to more than six months in prison regardless of whether he was convicted for any of the charges.¹²⁵ After convicting the defendant on three of the charges, the trial judge issued a sentence of concurrent terms of six months in prison for the first two charges, and a concurrent sentence of ten days in prison on the third

120. *See id.* (quoting *United States v. Potvin*, 481 F.2d 380, 382 (10th Cir. 1973)). *Potvin* was one of the earliest aggregation cases that involved a statutory petty offense. *See Potvin*, 481 F.2d at 380. In *Potvin*, the appellants were convicted without a trial by jury of two charges relating to unlawfully cutting down trees and camping in a national park. *See id.* at 381. Acknowledging the competing interests of the defendants in interposing a jury between them and the state, and those of the state in speedily and inexpensively adjudicating minor offenses, the *Potvin* court sided with the defendants. *See id.* at 382. The court found that the offenses in question arose out of the same criminal transaction, and would be viewed by defendants no less seriously than if they were charged with one serious offense arising out of the same act. *See id.* The court, therefore, held that the defendants were entitled to a jury trial because the aggregate potential sentence was more than six months in prison. *See id.* at 383.

121. *See Coppins*, 953 F.2d at 90. The court also cited with approval a district court opinion where the court had aggregated the potential prison term faced, and granted the defendants a trial by jury. *See id.* (citing *United States v. Musgrave*, 695 F. Supp. 231, 232-33 (W.D. Va. 1988)).

122. 926 F.2d 1512 (10th Cir. 1991).

123. *See id.* at 1518.

124. *See id.* at 1513-14. The court convicted Bencheck of: "operating a motorcycle without a windshield, face shield or goggles," "failing to obey a lawful order of a law enforcement officer," and "assault and battery of a police officer." *See id.* Prior to trial, the court dismissed a charge of malicious injury to property, and granted a motion for judgment of acquittal on a charge of operating a motor vehicle without a valid license. *See id.*

125. *See id.* at 1513.

count.¹²⁶ Ultimately, the defendant served only ten days in prison, serving the remainder of his sentence on probation.¹²⁷

Relying on precedent adopting a subjective approach to aggregation, the Tenth Circuit reaffirmed that defendants charged with multiple petty offenses arising from the same criminal transaction are eligible for a trial by jury, "only if he is actually threatened at the commencement of trial with an aggregate potential penalty of greater than six months' imprisonment."¹²⁸ The *Bencheck* court upheld the defendant's conviction, finding that he did not face such a risk because of the pre-trial commitment of the trial judge not to impose more than six months imprisonment.¹²⁹

126. *See id.* at 1514.

127. *See id.*

128. *Id.* at 1518 (quoting *Haar v. Hanrahan*, 708 F.2d 1547, 1553 (10th Cir. 1983)). *Haar* was a federal habeas corpus proceeding that involved the denial, on retrial de novo, of a trial by jury on two petty offenses. *See Haar*, 708 F.2d at 1547-48. In reviewing the appellant's petition, the Tenth Circuit Court of Appeals noted that a defendant charged with multiple petty offenses could aggregate the potential prison terms to secure a trial by jury. *See id.* at 1550 (citing *United States v. Potvin*, 481 F.2d 380, 382-83 (10th Cir. 1973)). The court then determined how this right should be determined: on the basis of the potential penalties faced based on the statutory definitions provided, an approach the court labeled "objective," or by the penalties that the defendant actually faced at the commencement of trial, an approach the court labeled "subjective." *See id.* at 1552.

Reviewing the objective approach, the court noted that criminal acts from which multiple petty charges might flow are categorized as serious. *See id.* The court also commented that protecting defendants in such situations remained consistent with the intent of the jury trial right to protect the defendant from government oppression. *See id.* Fearing that an objective approach would significantly broaden the definition of a "serious offense," however, the court declined to adopt the objective approach, stating that such a decision was best left to the United States Supreme Court. *See id.* at 1553.

The *Haar* court elected to apply a subjective approach when evaluating the appellant's claim. *See id.* Applying the subjective standard to the appellant's case, the court noted that New Mexico law provided that Haar would not face more prison time on retrial than he had been sentenced to initially. *See id.* at 1553-54. The *Haar* court held that he was not entitled to a jury trial, because he had not been sentenced to a term of imprisonment that evidenced the commission of a serious offense. *See id.* *See generally* Stephen C. Larson, Comment, *United States v. Bencheck: Aggregate Penalties and Jury Entitlement in Multiple Petty Offense Cases*, 69 DENV. U. L. REV. 763, 773-76 (1992) (criticizing the *Bencheck* decision as directly contravening the mandate of the Supreme Court in *Blanton v. City of N. Las Vegas*, 489 U.S. 538 (1989)).

129. *See Bencheck*, 926 F.2d at 1520. The court found support for its holding that a trial judge could obviate an accused's right to a jury trial by a pre-trial commitment in the Federal Rules of Criminal Procedure. *See id.* at 1519. The court reasoned that because Federal Rule of Criminal Procedure 58(a)(3) stipulates that the rules do not apply to petty offense prosecutions where the court stipulates that no sentence of imprisonment would be imposed, it logically followed that the trial judge should be allowed to obviate the right to a jury trial by stipulating a maximum prison term of no more than six months because the trial judge would be limited by Rule 58(a)(3) to the pre-trial commitment. *See id.*

Federal Rule of Criminal Procedure 58 governs prosecutions for misdemeanor and other petty offenses, as well as appeals to district court judges from trials conducted by magistrate judges. *See* FED. R. CRIM. P. 58(a)(1). The rules cross-reference the definition of

2. *Aggregation as Impermissible in Multiple Petty Offense Proceedings*

The Second¹³⁰ and Eleventh Circuits refused to allow defendants charged with multiple petty offenses to aggregate the potential prison term faced to secure a jury trial.¹³¹ For instance, in *United States v. Brown*,¹³² the defendant was charged with two petty offenses arising from a single incident.¹³³ The trial judge denied the defendant's request for a trial by jury and found him guilty on one of the counts.¹³⁴ The trial court sentenced Brown to three months of unsupervised probation, a fine of \$140, and a \$10 special assessment.¹³⁵

Reviewing Brown's challenge of the denial of a jury trial, the Eleventh Circuit held that defendants charged with multiple petty offenses could not aggregate the potential prison sentences they faced in order to secure

petty offenses contained in 18 U.S.C. § 19 when determining whether the rules of criminal procedure apply to petty offense prosecutions. See FED. R. CRIM. P. 58(a)(3).

In a situation similar to that present in *Bencheck*, a court has allowed the state to remedy the sentencing of a defendant charged with multiple petty offenses in order to effect a post hoc obviation of the right to a trial by jury. See *Rife v. Godbehere*, 814 F.2d 563, 565 (9th Cir. 1987). In *Rife*, the defendant was charged with three counts of the "unlawful use of the telephone to terrify, intimidate, annoy or harass," which is a petty offense under Arizona law. See *id.* at 564. Initially the defendant was sentenced to one year in prison, which after a series of appeals, was reduced to 180 days in prison. See *id.* Relying on Ninth Circuit precedent, the court held that although the appellant was entitled to a trial by jury because he faced more than six months in prison at the time his trial commenced, the state was allowed to remedy the denial of a trial by jury by reducing his sentence such that he would serve no more than six months in prison. See *id.* at 564-65 (citing *Maita v. Whitmore*, 508 F.2d 143, 146 (9th Cir. 1974)); see also *supra* notes 104-08 and accompanying text (discussing the holding in *Taylor v. Hayes*); *infra* notes 151-56 and accompanying text (discussing Justice Kennedy's analysis of Federal Rule of Criminal Procedure 58(a)(3) and the Court's holdings in *Taylor* and *Codispoti*).

130. See *infra* notes 143-44 and accompanying text (discussing the decision of the Second Circuit Court of Appeals in *United States v. Lewis*).

131. See *United States v. Brown*, 71 F.3d 845, 847 (11th Cir.), *cert. denied*, 116 S. Ct. 2580 (1996) (holding that a defendant is only entitled to a trial by jury when he or she is charged with a serious offense, and is not entitled to a trial by jury when charged only with multiple petty offenses); *United States v. Lewis*, 65 F.3d 252, 254 (2d Cir. 1995), *aff'd*, 116 S. Ct. 2163 (1996) (holding that the possibility of consecutive sentences for multiple petty offenses does not entitle a defendant to a trial by jury, which is only available to defendants charged with serious offenses, as evidenced by Congress's authorization of a sentence of more than six months in prison).

132. 71 F.3d 845 (11th Cir.), *cert. denied*, 116 S. Ct. 2580 (1996).

133. See *id.* at 846. Brown was charged with one count of removal of forest products from a national forest without authorization, and one count of parking in a restricted area. See *id.*

134. See *id.* The magistrate judge found Brown guilty of the charge of removal of forest products from a national forest without authorization and not guilty of the charge of parking in a restricted area. See *id.*

135. See *id.*

a trial by jury.¹³⁶ The court noted that the criteria to be considered mandated a jury trial only when the offense could be characterized as serious.¹³⁷ The court stated that such a characterization could be found only in a legislative authorization of a prison term for an offense of over six months.¹³⁸

Noting that other circuits had permitted petty offense aggregation in similar situations, the court characterized such efforts as being “case[s] where multiple zeros still add up to zero.”¹³⁹ The court subsequently upheld Brown’s conviction on the grounds that defendants faced with multiple petty offenses are not entitled to a trial by jury, regardless of the potential prison term they may face through aggregation.¹⁴⁰

II. THE DEATH OF AGGREGATION: *LEWIS V. UNITED STATES*

In *Lewis v. United States*,¹⁴¹ petitioner Ray Lewis, a mail handler for the United States Post Office, was charged with two counts of obstruction of the mails—a petty offense.¹⁴² The magistrate judge denied Lewis’s request for a jury trial and convicted him on both counts.¹⁴³ Lewis appealed to both the district court and the Second Circuit Court of Appeals, and both courts affirmed the denial of a jury trial.¹⁴⁴ After granting

136. *See id.* at 847.

137. *See id.*

138. *See id.*

139. *Id.* (quoting *United States v. Coppins*, 953 F.2d 86, 92 (4th Cir. 1991)) (Niemeyer, J., dissenting).

140. *See id.*

141. 116 S. Ct. 2163 (1996).

142. *See id.* at 2165. Obstruction of the mails is a violation of 18 U.S.C. § 1701. *See* 18 U.S.C. § 1701 (1994). The maximum penalty for this offense is not more than six months in prison and a \$5,000 fine. *See id.* § 19 (punishable by six months in prison and a fine under section 3571(b)(6)—not more than \$5,000). This places this offense of obstruction of the mails within the statutory definition of a petty offense. *See id.*

143. *See Lewis*, 116 S. Ct. at 2165. In denying Lewis a jury trial, the magistrate judge stated that she would not sentence the defendant to more than six months in prison if convicted. *See id.* Ultimately, Lewis was sentenced to terms of three years of probation on each count, to be served concurrently. *See United States v. Lewis*, 65 F.3d 252, 253 (2d Cir. 1995), *aff’d*, 116 S. Ct. 2163 (1996).

144. *See Lewis*, 65 F.3d at 253. The opinion of the district court was unreported. *See id.* The Second Circuit reasoned that, because Congress classified obstruction of the mails as a petty offense, Lewis was not eligible for a jury trial. *See id.* The court stated that the trial judge’s ability to impose consecutive sentences did not automatically entitle a defendant charged with multiple petty offenses to a jury trial. *See id.* at 254. Evaluating the possibility of consecutive sentences, the court reasoned that because the statute authorizing consecutive terms of imprisonment, 18 U.S.C. § 3584(a), states that multiple terms of imprisonment are served concurrently unless ordered to run consecutively by statute or court order, a presumption existed that multiple terms of imprisonment should be served concurrently. *See id.* at 255.

Lewis's petition for certiorari,¹⁴⁵ the Supreme Court affirmed the Court of Appeals, and held that he was not entitled to a jury trial because the mere commission of a petty offense multiple times does not render these offenses serious.¹⁴⁶

*A. The Majority Opinion: Twice "Petty" Does Not
Once "Serious" Make*

Writing for the *Lewis* majority, Justice O'Connor stated that the definition of an offense as petty by the legislature determines whether a defendant is entitled to a trial by jury.¹⁴⁷ She reasoned that once the legislature statutorily categorized the offense as petty, committing multiple petty offenses does not make the offense serious, and thereby entitle the defendant to a jury trial.¹⁴⁸

Under federal law, trial judges have discretion to impose consecutive sentences on a defendant. See 18 U.S.C. § 3584(a) (1994). In relevant part, the statute reads: "Multiple terms of imprisonment imposed at the same time run concurrently unless the court orders or the statute mandates that the terms are to run consecutively." *Id.* Some of the factors to be considered in determining whether sentences should run consecutively are listed in 18 U.S.C. § 3553(a):

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available.

Id. § 3553(a)(1)-(3); see also *infra* notes 174-83 and accompanying text (discussing the threat of consecutive sentences for a defendant charged with multiple petty offenses).

Having evaluated 18 U.S.C. § 3584(a), the Second Circuit argued that the presumption of concurrent terms illustrated Congress's view that petty offenses were no different in the aggregate than individually. See *Lewis*, 65 F.3d at 255. The court also noted that Lewis could have been denied any right to a trial by jury if the government had tried the two charges through separate informations. See *id.* Under such circumstances, Lewis would have had no right to a jury trial because he would have only been charged with one petty offense in each of the separate trials. See *id.*

145. See *Lewis v. United States*, 116 S. Ct. 807 (1996).

146. See *Lewis*, 116 S. Ct. at 2168.

147. See *id.* at 2167.

148. See *id.* The Court noted that precedent existed at common law allowing for a trial without a jury for a defendant charged with multiple petty offenses. See *id.* (citing *Queen v. Matthews*, 88 Eng. Rep. 609 (Q.B. 1712); *King v. Swallow*, 101 Eng. Rep. 1392 (K.B. 1799)).

Responding to Lewis's claim that *Codispoti v. Pennsylvania*¹⁴⁹ dictated that the potential sentences must be aggregated to secure a jury trial, Justice O'Connor stated that once the legislature determines that an offense is petty, such determination is controlling, and that review of the potential prison sentence faced is unnecessary.¹⁵⁰ She reasoned that *Codispoti* governed only the field of criminal contempt because of the particular circumstances involved in such cases, and because there is often no legislative determination as to the seriousness of the offense.¹⁵¹ In closing, the Court noted that, had the charges Lewis faced been tried separately, he would not have been entitled to a trial by jury,¹⁵² and that this was further evidence that Congress did not view petty offenses more seriously in the aggregate.¹⁵³

*B. The Concurrence: An Endorsement of a Subjective
System of Aggregation*

Justice Kennedy, joined by Justice Breyer, concurred in the judgment of the Court only, determining that Lewis was properly denied a jury trial by the magistrate judge's pretrial commitment not to sentence him to more than six months in prison.¹⁵⁴ He reasoned that because of the trial

149. 418 U.S. 506 (1974).

150. See *Lewis*, 116 S. Ct. at 2167.

151. See *id.* at 2168. The Court stated that because criminal contempts may prevent a judge from "maintaining the detachment necessary for fair adjudication," the guarantee of a jury trial in those circumstances was necessary to prevent the arbitrary exercise of power. See *id.*

152. See *id.*; *United States v. Lewis*, 65 F.3d 252, 255 (2d Cir. 1995), *aff'd*, 116 S. Ct. 2163 (1996) (reasoning that the government could properly deny a jury trial by bringing the charges in separate informations).

153. See *Lewis*, 116 S. Ct. at 2168.

154. See *id.* at 2169, 2172 (Kennedy, J., concurring in judgment). Justice Kennedy found support for this position in the Court's holding in *Taylor v. Hayes*, where the petitioner was found not to have been entitled to a trial by jury because he did not face more than six months in prison. See *id.* at 2169; *Taylor v. Hayes*, 418 U.S. 488, 496 (1974). Justice Kennedy also cited *Scott v. Illinois*, which held that a judge did not have to assign counsel to a defendant charged with a misdemeanor if he made a pretrial commitment not to impose any time in prison. See *Lewis*, 116 S. Ct. at 2172; *Scott v. Illinois*, 440 U.S. 367, 372-73 (1979). Justice Kennedy further cited Federal Rule of Criminal Procedure 58(a)(2), which allows district courts not to apply the Federal Rules of Criminal Procedure in petty offense cases where no sentence of imprisonment will be imposed because of a pretrial commitment not to do so. See *Lewis*, 116 S. Ct. at 2172; FED. R. CRIM. P. 58(a)(2); see also *supra* notes 104-08 and accompanying text (discussing the *Taylor* holding); *supra* note 129 (providing the *Bencheck* court's discussion of Federal Rule of Criminal Procedure 58(a)(3)).

judge's commitment, Lewis faced no more than six months in prison—a sentence to which no jury trial right attaches.¹⁵⁵

The concurrence then evaluated the Court's holdings in *Codispoti* and *Taylor v. Hayes*,¹⁵⁶ arguing that those rulings stood for the proposition that defendants are entitled to a trial by jury when the aggregate sentence for multiple petty offenses tried in a single proceeding would exceed six months in prison.¹⁵⁷ Justice Kennedy disputed the majority's limitation of *Codispoti* and *Taylor* as only concerning those contempt offenses for which there was no maximum sentence authorized by the legislature.¹⁵⁸

Justice Kennedy proclaimed that his argument rested on a fundamental pillar of American jurisprudence: that the function of a jury is to stand between a defendant and the state when the state seeks to deprive the defendant of his or her liberty for a significant amount of time.¹⁵⁹ He argued that such considerations are present whenever the defendant is sentenced to a prison term of more than six months, whether it be for a single serious offense or for multiple petty offenses.¹⁶⁰

The concurrence charged that the majority's holding would permit a clever prosecutor, who already possesses broad power to frame charges,¹⁶¹ to obviate a defendant's right to a jury trial by dividing serious charges into smaller, petty offenses.¹⁶² The majority, Justice Kennedy argued, had seemingly given tacit approval to a prosecutor seeking to divide a serious offense into smaller ones, as well as to deprive a defendant of the jury trial right altogether by bringing multiple charges in separate informations.¹⁶³ In conclusion, the concurrence noted that, although the

155. See *Lewis*, 116 S. Ct. at 2172 (Kennedy, J., concurring in judgment); cf. III ABA STANDARDS, *supra* note 4, at § 15-1.2(a)-(b) and commentary at 16-17, 20-21 (proposing that a defendant, entitled to a jury trial, be allowed to "waive" that right and proceed with a bench trial upon consent of the court and the prosecutor, provided the defendant's statement of waiver is made in writing or on the record in open court).

156. 418 U.S. 488 (1974).

157. See *Lewis*, 116 S. Ct. at 2169 (Kennedy, J., concurring in judgment).

158. See *id.* at 2170.

159. See *id.* at 2171.

160. See *id.*

161. See *id.* (citing *Ball v. United States*, 470 U.S. 856, 859 (1985) (acknowledging the government's broad discretion to conduct criminal prosecutions and select the charges brought against individual defendants)).

162. See *id.*

163. See *id.* Justice Kennedy stated a defendant would face a potentially significant deprivation of liberty where a prosecutor might bring two charges in separate trials. See *id.* A defendant in that position would be facing a significant deprivation of liberty because sentences imposed in separate proceedings are served consecutively unless the court orders them to run concurrently, whereas sentences imposed at the same time run concurrently unless the court orders the sentences to run consecutively. See 18 U.S.C. § 3584(a) (1994). The concurrence argued that in the case where a prosecutor would bring the charges sepa-

majority correctly determined that Lewis was not entitled to a jury trial, the rationale employed by the Court did great harm to the right to a trial by jury.¹⁶⁴

C. The Dissent: Aggregation as an Absolute Right in Multiple Petty Offense Prosecutions

In dissent, Justices Stevens, with whom Justice Ginsburg joined, agreed with the concurrence's position that a prosecution involving possible incarceration in excess of six months, whether for a single or multiple offenses, was sufficiently serious to confer the right to a jury trial on a defendant.¹⁶⁵ Justice Stevens, however, disagreed with the concurrence's argument that the judge's pretrial commitment deprived Lewis of any right to a jury trial, positing that the right attaches when the prosecution commences, and cannot be avoided by a pretrial commitment.¹⁶⁶ The dissent also asserted that the majority had misread the criminal contempt cases, arguing that *Codispoti* stood for the proposition that when the sentence imposed exceeds six months, a defendant is absolutely entitled to a jury trial.¹⁶⁷ Justice Stevens argued that a right to a trial by jury attaches

rately, the process would provide a defendant additional protection because the prosecutor's case would be tested multiple times by different judges. *See Lewis*, 116 S. Ct. at 2171. This would force the prosecutor to justify the inherently inefficient division of charges in the course of evaluating the case. *See id.* at 2172. The concurrence argued that the Court's holding, however, deprived a defendant of these protections should the multiple petty offenses charged be consolidated in one trial. *See id.*

The concurrence also alleged that the effects of the Court's holding would have a wide-ranging impact on the sentences imposed on criminal defendants. *See id.* at 2172. Surveying the many regulatory offenses, Justice Kennedy argued that the Court's holding would expose defendants charged with those offenses to years behind prison walls without the benefit of a trial by jury. *See id.* Justice Kennedy stated that these regulatory offenses were often violated discretely and, sometimes unknowingly, but that regardless, under the Court's rationale, no person charged with them would be entitled to a trial by jury. *See id.* (citing as examples: 16 U.S.C. § 707 (1994) (violations of migratory bird treaties, laws, and regulations); 29 U.S.C. § 216 (1994) (penalties authorized for violations of the Fair Labor Standards Act); 36 C.F.R. § 1.3 (1995) (violations of regulations of the National Park Service); 36 C.F.R. § 261.1b (1995) (violations of prohibitions of the Forest Service); 36 C.F.R. § 327.25 (1995) (violations of water resource development project regulations as enforced by the Army Corps of Engineers); and 43 C.F.R. § 8351.1-1(b) (1995) (violations of regulations of the Bureau of Land Management under the National Trails System Act of 1968)).

164. *See id.* at 2172-73 (Kennedy, J., concurring in judgment).

165. *See id.* at 2173 (Stevens, J., dissenting).

166. *See id.* at 2173-74 (arguing that there is "no basis for assuming that the dishonor associated with multiple convictions for petty offenses is less than the dishonor associated with conviction of a single serious crime").

167. *See id.* at 2173.

the moment charges are brought.¹⁶⁸ Because Lewis faced more than six months in prison at that time, the dissent reasoned that he should have been granted a trial by jury.¹⁶⁹

III. BETWEEN A ROCK AND A DEFINITION: THE PAST, PRESENT, AND FUTURE OF THE PETTY OFFENSE EXCEPTION

The underlying problem in *Lewis*, although not explicitly addressed by the majority, was how the Court should read the statute that authorizes consecutive sentences for defendants charged with multiple petty offenses.¹⁷⁰ The *Lewis* Court's refusal to allow aggregation of potential penalties by defendants charged with multiple petty offenses¹⁷¹ permits the sentencing of that defendant to consecutive terms of imprisonment exceeding six months.¹⁷² Under the majority's approach, a defendant charged with multiple petty offenses could face a lengthy prison sentence traditionally reserved for serious criminal convictions,¹⁷³ while the determination of his right to a jury trial is assessed as if he were accused of only a single petty offense.¹⁷⁴ Further, the *Lewis* Court's resolution of the aggregation of imprisonment, combined with the Court's earlier rationale in *Blanton v. City of North Las Vegas*,¹⁷⁵ may provide incentive to

168. *See id.* Justice Stevens argued that this reasoning was supported by the text of the Sixth Amendment through its reference to the right to a jury trial in all "criminal prosecutions." *See id.*; U.S. CONST. amend. VI.

169. *See Lewis*, 116 S. Ct. at 2174 (Stevens, J., dissenting); *see also* III ABA STANDARDS, *supra* note 4, at § 15-1.1 & commentary at 8 (proposing that the right to a jury trial be guaranteed whenever a defendant faces time in prison because the jury trial right is so fundamental to our system of justice that it should not be restricted).

170. The Second Circuit addressed this question in *United States v. Lewis*, 65 F.3d 252, 254-55 (2d Cir. 1995), *aff'd*, 116 S. Ct. 2163 (1996). The Second Circuit read the language in 18 U.S.C. § 3584(a) as creating a presumption that sentences would run concurrently. *See id.* at 255.

171. *See Lewis*, 116 S. Ct. at 2168.

172. *See id.* (holding that defendants charged with multiple petty offenses are not entitled to a trial by jury).

173. *See id.* *But see* *Codispoti v. Pennsylvania*, 418 U.S. 506, 517 (1974) (holding that the imposition of consecutive sentences in excess of six months for multiple petty offenses of contemptuous conduct, tried in a single proceeding, constitutes a "serious offense" entitling the defendant to a jury trial).

174. *See Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989) (holding that where the maximum prison sentence a defendant could receive is six months, the offense is presumed to be petty, and no right to a jury trial attaches, unless the defendant demonstrates that the additional statutory penalties authorized by the legislature are so severe as to clearly reflect the legislative intent to treat the offense as "serious").

175. *See supra* notes 85-93 and accompanying text (discussing the holding in *Blanton*).

legislatures and courts to expand other statutory penalties that can be imposed for petty offenses.¹⁷⁶

A. *The Threat of Consecutive Sentences*

Contrary to the Second Circuit's interpretation of the consecutive sentences provision of the criminal code,¹⁷⁷ the statute confers on the trial judge a broad grant of discretion to impose consecutive sentences on a defendant.¹⁷⁸ Although the statute provides that, "[m]ultiple terms of imprisonment imposed at the same time run concurrently,"¹⁷⁹ these words are followed by, "*unless the court orders or the statute mandates that the terms are to run consecutively.*"¹⁸⁰

Among the factors that the trial judge may consider in deciding whether to order consecutive sentences are the nature and circumstances of the criminal act¹⁸¹ and "the need . . . to reflect the *seriousness of the offense.*"¹⁸² Implicit, then, in the imposition of consecutive sentences may be the court's judgment that the defendant committed a serious of-

176. Compare *Richter v. Fairbanks*, 903 F.2d 1202, 1205 (8th Cir. 1990) (arguing that allowing a mandatory 15-year revocation of a driver's license for a third time DWI offense to be classified as "petty" would improperly permit the state "to defeat the right to a jury trial by keeping the prison sentence to no more than six months, while finding other severe penalties to punish what it considers to be a serious offense"), with *United States v. Soderna*, 82 F.3d 1370, 1378-79 (7th Cir.), *cert. denied*, 117 S. Ct. 507 (1996) (holding that imposition of a six month prison sentence coupled with a \$10,000 fine—an amount twice the size of that allowed for a petty offense—nevertheless constituted a petty offense and did not trigger the Sixth Amendment right to a jury trial).

177. See *United States v. Lewis*, 65 F.3d 252, 255 (2d Cir. 1995), *aff'd*, 116 S. Ct. 2163 (1996) (arguing that "the presumption under § 3584(a) is that multiple offenses prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction").

178. See 18 U.S.C. § 3584(a)(1994); see also ARTHUR W. CAMPBELL, LAW OF SENTENCING § 75, at 246-48 (1978) (discussing the principle "firmly rooted in common law" that the decision to impose consecutive sentences remains within the discretion of the sentencing judge, and that the standard of review is whether the sentencing judge abused this discretion).

179. 18 U.S.C. § 3584(a) (1994).

180. *Id.* (emphasis added).

181. See *id.* § 3553(a)(1). This subsection also allows the history and characteristics of the defendant to be considered as factors in imposing a sentence. See *id.*

182. *Id.* § 3553(a)(2)(A) (emphasis added). This subsection also allows the goals of promoting respect for the law and providing just punishment for the offense to be considered as factors in imposing a sentence. See *id.*; cf. IV ABA STANDARDS, *supra* note 4, § 20-1.2(a), at 14 (proposing that courts reviewing sentences imposed for criminal conduct do so with an eye to correcting a sentence that does not adequately take into account, "the nature of the offense, the character of the offender, and the protection of the public interest").

fense, although charged only with multiple petty offenses.¹⁸³ Under the rationale of *Lewis*, defendants charged with multiple petty offenses would seemingly be exposed to serious time in prison without the interposition of a jury between themselves and the state.¹⁸⁴ A trial judge, therefore, is free to impose consecutive sentences on a defendant charged with multiple petty offenses, and to send that defendant to prison for more than six months without the benefit of a jury trial.¹⁸⁵

B. Pick Your Poison: The Inherent Unattractiveness of the Objective and Subjective Approaches to Aggregation

Given the inherent risk to a defendant in the resolution provided by the *Lewis* Court, the question arises as to whether the Court had available to it a more attractive option.¹⁸⁶ The Supreme Court's holding in *Lewis*, however, provides the most attractive of a series of unattractive choices.

183. See *Codispoti v. Pennsylvania*, 418 U.S. 506, 516-17 (1974) (holding that because consecutive sentences were imposed for multiple petty offenses tried in a single proceeding, the defendant "was tried for what was equivalent to a serious offense and was entitled to a jury trial"). But see *infra* note 192 and accompanying text (pointing out that the theoretical threat of consecutive sentences has rarely materialized in sentencing).

184. See *Lewis v. United States*, 116 S. Ct. 2163, 2167 (1996) (holding that defendants charged with multiple petty offenses are not entitled to a trial by jury).

185. Compare *Codispoti*, 418 U.S. at 517 (holding that where consecutive sentences were imposed on a defendant charged with multiple petty offenses of contempt, the defendant was entitled to a trial by jury), and *Taylor v. Hayes*, 418 U.S. 488, 495-96 (1974) (holding that a defendant sentenced to concurrent terms of six months in prison was not entitled to a trial by jury), with *Lewis*, 116 S. Ct. at 2168 (holding that defendants charged with multiple petty offenses and facing an aggregate potential term of incarceration in excess of six months are not entitled to a trial by jury).

There has been some commentary as to how to solve this problem without resorting to post-conviction review. See III ABA STANDARDS, *supra* note 4, at § 18-4.5(b) & commentary at 290-91. The ABA proposes that the authority to impose consecutive sentences be limited, in part, by the following criteria: (1) placing a ceiling on the aggregate maximum of terms that is reasonably related to the severity of the offenses; (2) preventing the imposition of consecutive sentences until a presentencing report has been considered; and (3) requiring an explicit finding by the sentencing court that consecutive sentences are necessary to protect the public from the future criminal conduct of that defendant. See *id.*

186. See *United States v. Coppins*, 953 F.2d 86, 90 (4th Cir. 1991) (holding that defendants charged with multiple petty offenses arising out of the same act or criminal transaction are entitled to a trial by jury when the potential aggregate prison term exceeds six months); *United States v. Bencheck*, 926 F.2d 1512, 1518-20 (10th Cir. 1991) (noting that defendants charged with multiple petty offenses are entitled to a trial by jury when, in the aggregate, they are actually faced with more than six months in prison at the commencement of trial); *Rife v. Godbehere*, 814 F.2d 563, 564-65 (9th Cir. 1987) (holding that the imposition of consecutive sentences for multiple petty offenses in excess of six months imprisonment triggers a defendant's Sixth Amendment right to a jury trial).

It is necessary to reiterate that the petty offense doctrine arose in an effort to balance the right of the defendant charged with a petty offense with the right of the state to expeditiously and economically administer its judicial system.¹⁸⁷ As such, the *Lewis* Court chose the only option that properly addressed these interests.¹⁸⁸

1. *Aggregation as an Absolute Right in Multiple Petty Offense Prosecutions: The Objective Approach*

The Court's first option was to strictly read the trial judge's discretion to impose consecutive sentences,¹⁸⁹ and hold that defendants charged with multiple petty offenses have a right to a trial by jury if they face possible incarceration in excess of six months.¹⁹⁰ To view such discretion so broadly would, however, extend statutory interpretation to an illogical and impractical extreme.¹⁹¹ In practice, a defendant charged with multi-

187. See *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989) (noting that in petty offense prosecutions, the state's interest in speedy and inexpensive bench trial adjudications outweighs a defendant's right to a jury trial); *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968) (finding that concerns for efficient law enforcement and simplified judicial administration outweigh any interest a defendant charged with a petty offense might have in asserting his or her right to a jury trial); *District of Columbia v. Clawans*, 300 U.S. 617, 624 (1937) (observing that it was a long established and accepted practice to expeditiously try petty offenses without a jury); *Callan v. Wilson*, 127 U.S. 540, 552-53 (1888) (noting the long established practice of permitting the summary disposition of certain minor or petty offenses without a jury trial).

188. See *Lewis*, 116 S. Ct. at 2168 (holding that defendants charged with multiple petty offenses were not entitled to a jury trial).

189. See 18 U.S.C. § 3584(a) (1994) (providing that "[m]ultiple terms of imprisonment imposed at the same time run concurrently *unless the court orders . . . that the terms are to run consecutively*" (emphasis added)).

190. Cf. *Coppins*, 953 F.2d at 90 (holding that when a defendant faces prosecution for multiple petty offenses, "the maximum sentences of imprisonment authorized for those petty offenses with which [the defendant] was charged should [be] aggregated for purposes of determining [the defendant's] right to jury trial").

191. See *United States v. Lewis*, 65 F.3d 252, 255 (2d Cir. 1995), *aff'd*, 116 S. Ct. 2163 (1996) (presuming "under § 3584(a) . . . that multiple offenses prosecuted jointly are no more serious in their aggregate than the most serious single offense of conviction"); see also CAMPBELL, *supra* note 178, § 76, at 249 (explaining that in many jurisdictions, there exists a presumption that multiple sentences imposed simultaneously will run concurrently).

Given the language of 18 U.S.C. § 3584(a), it appears that use of the maxim of statutory construction *expressio unius est exclusio alterius* ("the expression of one thing is the exclusion is the exclusion of another") provides the most appropriate means of reading the statute. See *In re Cash Currency Exch., Inc.*, 762 F.2d 542, 552 (7th Cir. 1985) (applying this maxim of statutory interpretation in another context); *Burgin v. Forbes*, 169 S.W.2d 321, 325 (Ky. 1943) (same); 2A NORMAN J. SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION, §§ 47.23-25, at 216-17, 228, 234-35 (5th ed. 1992) (discussing the uses and limits of this maxim of statutory interpretation); WILLIAM P. STATSKY, LEGISLATIVE ANALYSIS AND DRAFTING 84 (2d ed. 1984) (same); see also BLACK'S, *supra* note 56,

ple petty offenses is rarely sentenced to anything more than what a single petty offense would authorize.¹⁹² In those rare cases where the sentence imposed exceeds that authorized for a single petty offense, the danger that such a sentence might be unjust is ameliorated by the availability of appellate review.¹⁹³

at 581. Applying this to 18 U.S.C. § 3584(a), it is apparent that the mention that consecutive sentences will be imposed only by court order or statutory mandate creates a presumption that sentences imposed at the same time will run concurrently. *See Lewis*, 65 F.3d at 255 (reasoning that 18 U.S.C. § 3584(a) creates a presumption that sentences imposed at the same time run concurrently).

192. *See, e.g., Lewis*, 65 F.3d at 253 (three years probation); *Coppins*, 953 F.2d at 87 (a fine of \$170); *United States v. Bencheck*, 926 F.2d 1512, 1514 (10th Cir. 1991) (10 days in jail, remainder of six month sentence to be served on probation); *United States v. Potvin*, 481 U.S. 380, 381 (10th Cir. 1973) (three months in prison); *State v. Harrison*, 792 P.2d 779, 780 (Ariz. Ct. App. 1990) (90 day suspension of driver's license and \$448 in fines); *Foote v. United States*, 670 A.2d 366, 368 (D.C. 1996) (six months in prison); *State v. Burton*, 540 So. 2d 1023, 1024 (La. Ct. App. 1989) (\$400 in fines); *State v. Gillespie*, 486 So. 2d 984, 985 (La Ct. App. 1986) (one year unsupervised probation and \$600 in fines); *State v. Sanchez*, 786 P.2d 42, 43 (N.M. 1990) (four months in prison). *But see Codispoti v. Pennsylvania*, 418 U.S. 506, 509 (1974) (39 months in prison).

Looking at the conduct at trial of Codispoti and his codefendant, Langnes, one can understand why their sentences were so long. The behavior of Langnes can be described as disrespectful, rude, menacing, and somewhat bizarre, as found in the following excerpts of the contempt charges against him:

"2. That while on trial as aforesaid on November 29, 1966, he, the defendant, threatened to blow the trial judge's head off, by saying, 'If I have to blow your head off, that's exactly what I'll do. I don't give a damn if its on the record or not. If I got to use force, I will. That's what the hell I'm going to do.'

3. That while on trial as aforesaid on December 1, 1966, he, the defendant, accused and threatened the court by saying, . . . 'Now I refuse to go on with this trial if you are going to railroad me and badger my witnesses, force me to an unfair trial, that is exactly what I am going to do, punk. I'm going to blow your head off. You understand that?'"

Id. at 509 n.2

Langnes's comments for the trial judge primarily related to his desire to do the judge bodily harm, however, in one charge, his comments took on a political bent:

"5. That while on trial as aforesaid on December 5, 1966, he, the defendant, made scurrilous remarks to the court by saying, 'For the record, I would like to state that as far as my personal opinion is concerned, communist Russia, communist China, and Cuba need men like you. I think wherever you came from you infiltrated the courts and the whole place might as well be communist Russia.'

6. That while on trial as aforesaid on December 9, 1966, he, the defendant, threatened the life of the court by saying, . . . 'I won't even dignify these stinking proceedings, punk, go to hell, and I will shake hands in hell with you. I will be damned to you.' Also, he, the defendant, said, 'You are a dead man, stone dead. Your Honor.'"

Id. at 510 n.2

193. *See Richter v. Fairbanks*, 903 F.2d 1202, 1204 (8th Cir. 1990) (concluding that the severity of a mandatory 15-year revocation of the defendant's driver's license upon a third conviction for DWI, coupled with a six month prison term, sufficiently demonstrated that the state legislature considered the offense a serious crime); *see also* Jeff E. Butler, Note,

Moreover, such an approach would unduly narrow the state's ability to adjudicate petty offenses without a jury to only those cases charging a single petty offense; any case where more than one petty offense was alleged would unequivocally guarantee the defendant the right to a jury trial.¹⁹⁴ The only method through which the state could deny the defendant a right to a trial by jury would be to try each of the charges separately, which would not only greatly impair judicial economy,¹⁹⁵ but may likewise cause otherwise concurrent sentences to be served consecutively.¹⁹⁶ A system of objective aggregation, therefore, would accord insufficient weight to significant state interests.¹⁹⁷

Petty Offenses, Serious Consequences: Multiple Petty Offenses and the Sixth Amendment Right to Jury Trial, 94 MICH. L. REV. 872, 888-89 (1995) (arguing that the amount of prosecutorial abuse that could occur would be small under a petty offense exception that proscribed aggregation); *infra* notes 237-42 and accompanying text (discussing the applicability of 18 U.S.C. § 3742 in post-conviction appeals for defendants sentenced to consecutive terms of imprisonment on multiple petty offenses); *cf.* 18 U.S.C. § 3742(a)(4) (1994) (allowing a defendant to appeal a sentence "imposed for an offense for which there is no sentencing guideline and is plainly unreasonable"). See generally LARRY W. YACKLE, POSTCONVICTION REMEDIES § 31-34 (1981) (discussing the nature of 18 U.S.C. § 2255 as an effective means of collaterally challenging federal convictions); IV ABA STANDARDS, *supra* note 4, § 20-1.2(a), at 14 (proposing that one of the general objectives of sentence review is to correct sentences that are excessive in length, taking into consideration the nature of the offense, the character of the defendant, and the security of the public interest).

194. See *Haar v. Hanrahan*, 708 F.2d 1547, 1552-54 (10th Cir. 1983) (discussing and declining to adopt an objective measure of aggregated criminal penalties in determining a defendant's right to a jury trial, because it would greatly expand the scope of "serious offenses" to which defendants would be entitled to a jury trial); see also *Bencheck*, 926 F.2d at 1515 (arguing that, were federal judges compelled to conduct a jury trial for each of the 83,092 petty offenses adjudicated in 1987, in addition to jury trials required for serious criminal offenses, the system would face an impossible task). But see Christine E. Pardo, Note, *Multiple Petty Offenses with Serious Penalties: A Case for the Right to Trial by Jury*, 23 FORDHAM URB. L.J. 895, 918-22 (1996) (arguing that a doctrine that allowed defendants charged with multiple petty offenses to aggregate those charges to secure a trial by jury is the only system under which a defendant's right to a trial by jury would be adequately protected).

195. See *United States v. Dixon*, 509 U.S. 688, 711 n.15 (1993) (arguing that "the Government must be deterred from abusive, repeated prosecutions of a single offender for similar offenses by the sheer press of other demands upon prosecutorial and judicial resources").

196. See 18 U.S.C. § 3584(a) ("Multiple terms of imprisonment imposed at different times run consecutively unless the court orders that the terms are to run concurrently.").

197. See III ABA STANDARDS, *supra* note 4, § 15-1.1 & commentary, at 9 (observing that "[t]he traditional explanation for th[e] denial of jury trial in minor offenses is that it is justified by the public interest in prompt and inexpensive trial of petty offenses"). But see *id.* at 10 ("Most states have found it possible to grant most misdemeanor defendants the opportunity for trial by jury, and no evidence has been found that the cost has been unduly burdensome or that significant . . . delays have resulted." (emphasis added)).

2. *Be Careful What You Ask For, You Might Get More Than You Bargained For: The Subjective Approach to Aggregation*

The *Lewis* Court's second option was to adopt the subjective aggregation approach endorsed by the concurrence.¹⁹⁸ Under this approach, a defendant charged with multiple petty offenses could receive a jury trial only when he or she actually faced more than six months in prison at the outset of trial.¹⁹⁹ This would permit avoidance of a trial by jury through a trial judge's promise not to sentence the defendant to more than six months in prison.²⁰⁰

The primary fault in this approach is that it would be difficult to administer, and potentially unfair due to a lack of criteria to be applied in making such a stipulation. For example, suppose two defendants are charged with an identical battery of petty offenses. In such a case, one defendant might escape serious penalties based on a pretrial stipulation from the first judge and receive no more than six months in prison,²⁰¹ whereas, the other defendant might be exposed to a host of penalties, including consecutive sentences in excess of six months imprisonment, based solely upon an unguided determination by the second trial judge.²⁰²

Without guidelines, such a broad grant of discretion is inherently suspect.²⁰³ Where a judge either imposes consecutive sentences for multiple

198. See *Lewis*, 116 S. Ct. at 2169 (Kennedy, J., concurring in judgment) ("[A] defendant is entitled to a jury if tried in a single proceeding for more than one petty offense when the combined sentences will exceed six months' imprisonment . . . even if each [offense] is petty by itself.").

199. See *Bencheck*, 926 F.2d at 1518.

200. See *id.* at 1519.

201. See *id.* at 1514. The defendant in *Bencheck* was sentenced to concurrent terms of six months on two convictions and ten days for a third conviction—the latter running concurrently with the first two sentences. See *id.* Having placed the defendant on probation for the remainder of the six month concurrent sentences, the terms were imposed so the defendant would not spend more than ten days in jail. See *id.*

202. Compare *Codispoti v. Pennsylvania*, 418 U.S. 506, 509 (1974) (involving a defendant charged with seven contempts of court and sentenced to a total of 39 months in prison, though not sentenced to more than six months in prison on any one count), with *Taylor v. Hayes*, 418 U.S. 488, 490-93 (1974) (involving a trial judge who originally charged the defendant with nine contempts of court and sentenced him to almost four and one-half years, but who subsequently altered the sentence without indicating whether the new sentence would run concurrently or consecutively).

203. None of the pretrial commitment cases discuss when, and under what circumstances, a trial judge may choose to obviate a defendant's jury trial right in multiple petty offense proceedings. See *United States v. Coppins*, 953 F.2d 86 (4th Cir. 1991) (making no mention of whether a judge could obviate a defendant's right to aggregate to secure a trial by jury); *Bencheck*, 926 F.2d at 1519 (holding that a trial judge may obviate a defendant accused of multiple petty offenses right to a jury trial by pretrial commitment, but failing to identify any criteria that may be used in making that decision); *Rife v. Godbehere*, 814 F.2d 563, 565 (9th Cir. 1987) (concluding that the improper denial of a jury trial is reme-

petty offenses tried in a single proceeding, or thwarts a defendant's right to a jury trial by invoking a pretrial commitment to impose a sentence of no more than six months in prison, the judge effectively supplants his own judgment for that of the legislature.²⁰⁴ The apparent arbitrary nature of the subjective approach is evidenced by the fact that those courts who adopted this approach articulated no guidelines governing such a pretrial commitment.²⁰⁵

Furthermore, a subjective system, though limiting the number of instances where the defendant may claim a trial by jury, encourages the state and the trial judge to thwart that right. While an offense can be made presumptively petty if the court agrees to a maximum sentence of six months in prison, the trial judge could subsequently impose significant collateral consequences, such as excessive fines, that would equal a serious offense.²⁰⁶ The flexibility of the petty offense presumption encourages the state to expand the collateral consequences that can be imposed without making the offense serious enough to warrant a jury trial.²⁰⁷

C. *The Incredible Expanding Petty Offense Fine*

The *Lewis* decision finally settles the issue of whether a defendant charged with one or more petty offenses can demand a jury trial on the

died when a trial judge reduces a defendant's initial sentence to a term not exceeding six months, however, failing to furnish any guidance to lower courts in subsequently addressing similar decisions).

204. See *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 541-42 (1989) (stating that courts should not substitute their judgment for that of the popularly elected legislature).

205. 18 U.S.C. § 3584(a) authorizes the trial judge to impose consecutive sentences, and 18 U.S.C. § 3553(a)(2)(A) states that one of the factors to be considered in deciding whether to impose consecutive sentences is the seriousness of the offense. See 18 U.S.C. § 3584(a) (1994); *id.* § 3553(a)(2)(A). Thus, from the imposition of consecutive sentences, one might infer that the defendant had, in fact, committed a serious offense. See *Codispoti*, 418 U.S. at 517 (holding that where consecutive sentences had been imposed totaling more than six months imprisonment, the defendant had in fact been tried for the equivalent of a serious offense, and was entitled to a trial by jury). But see III ABA STANDARDS, *supra* note 4, § 15-1.2(a) & commentary, at 16-17, 20-21 (proposing that a defendant, entitled to a jury trial, be allowed to "waive" that right and proceed with a bench trial upon the consent of the court and the prosecutor, provided the defendant's statement of waiver is in writing or on the record in open court).

206. See *Richter v. Fairbanks*, 903 F.2d 1202, 1204-05 (8th Cir. 1990) (holding that a mandatory 15-year revocation of a driver's license for a third DWI conviction evidenced a legislative determination that the offense was serious in nature).

207. Cf. *United States v. Soderna*, 82 F.3d 1370, 1378-79 (7th Cir.), *cert. denied*, 117 S. Ct. 507 (1996) (allowing Congress to impose, for a presumptively petty offense, a fine twice the maximum amount authorized by statute for a petty offense).

grounds of the applicable statutorily prescribed prison term.²⁰⁸ The question remains as to whether a defendant charged with one or multiple petty offenses can successfully claim a trial by jury based on the holding of the Court in *Blanton v. City of North Las Vegas*.²⁰⁹ The *Blanton* Court held that a presumptively petty offense may be deemed serious if additional statutory penalties, when read in conjunction with the maximum prison term authorized, are so severe as to demonstrate that the legislature considered the offense serious.²¹⁰ This presumption has been pierced only once, in a case where a mandatory fifteen year revocation of a driver's license, when considered along with a maximum prison term of six months for a third-offense DWI, was considered severe enough to merit a trial by jury.²¹¹ The additional statutory penalties exception found in the *Blanton* decision will now serve as a fertile arena for petty offense litigation, especially since, in light of the *Lewis* decision, legislatures and courts may have even more incentive to further push the boundaries of an already burgeoning body of additional statutory penalties.

An example of the current legislative and judicial incentive to expand statutory consequences can be found in the growing range of fines for petty offenses.²¹² The Freedom of Access to Clinic Entrances Act (FACE)²¹³ provides that a defendant found guilty of the offense of a first time, non-violent, physical obstruction of a clinic entrance may be sentenced to no more than six months in prison and a fine not to exceed \$10,000.²¹⁴ Although the maximum prison sentence makes this crime presumptively petty,²¹⁵ the fine imposed is double the amount typically allowed for petty offenses.²¹⁶

208. See *Lewis v. United States*, 116 S. Ct. 2163, 2168 (1996) (holding that defendants charged with multiple petty offenses were not entitled to a jury trial even though they faced, in the aggregate, more than six months in prison).

209. See *supra* notes 85-93 and accompanying text (discussing the Supreme Court's decision in *Blanton v. City of N. Las Vegas*, 489 U.S. 538 (1989)).

210. See *Blanton*, 489 U.S. at 543.

211. See *Richter v. Fairbanks*, 903 F.2d 1202, 1204-05 (8th Cir. 1990); see also *supra* note 92 (discussing the decision of the Eighth Circuit in *Richter* and the subsequent decisions of other Circuits regarding this exception to the *Blanton* decision).

212. See 18 U.S.C. § 248(b)(2) (1994) (providing a maximum \$10,000 fine for a presumptively petty offense).

213. 18 U.S.C. § 248 (1994).

214. See *id.* § 248(b)(2).

215. See *Blanton*, 489 U.S. at 543 (holding that offenses for which the maximum prison term is six months are presumed to be petty, and that defendants charged with them are not entitled to a jury trial unless the defendant can overcome the presumption).

216. See 18 U.S.C. § 3571(b)(6)-(7) (maximum fine of \$5,000). Compare 18 U.S.C. § 19 (1994), and *id.* § 3571(b)(6)-(7), with *id.* § 248(b)(2). Federal law defines a petty offense as "a Class B misdemeanor, a Class C misdemeanor, or an infraction, for which the maximum

Nevertheless, in *United States v. Soderna*,²¹⁷ the Seventh Circuit held that the \$10,000 fine provision in FACE did not render the offense serious.²¹⁸ The *Soderna* court reasoned that because *Blanton v. City of North*

fine is *no greater than* the amount set forth for such an offense in section 3571(b)(6) or (7) in the case of an individual." *Id.* § 19 (emphasis added). Class B or C misdemeanors, and infractions, that do not result in death, are punishable by a fine of not greater than \$5,000. *See id.* § 3571(b)(6)-(7).

The legislative history of FACE is silent as to why the penalty for a first offense non-violent obstruction was set at six months in prison and a \$10,000 fine. *See* H.R. CONF. REP. NO. 103-488, at 9 (1994), *reprinted in* 1994 U.S.C.A.A.N. 724, 726. The House version of the Act did not contain a provision for non-violent obstruction, while the Senate version did provide for such an offense. *See id.* At conference, it was decided that with respect to this issue, the Senate version should be enacted. *See id.* The only mention of fines was that the level might have to be reconsidered at a later date if "the passage of time ha[d] rendered these statutory amounts obsolete." *Id.*

This silence is not explained by referencing other federal civil rights laws, upon which the prohibited activities section of FACE was "closely modeled." *See id.* at 8 (stating that FACE had been "closely modeled on federal civil rights laws" (including 18 U.S.C. § 245(b), 42 U.S.C. § 3631, 18 U.S.C. § 247)). Under 18 U.S.C. § 245(b), it is unlawful to "injure [], intimidate [], or interfere [] with, or attempt to injure, intimidate, or interfere with" federally protected activities such as voting, enrolling, or attending a public school or college, and "enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States." *See* 18 U.S.C. § 245(b) (1994). A person violating this section shall be imprisoned for not more than one year or fined in accordance with Title 18. *See id.* The maximum prison term of one year categorizes the offense as serious. *See Baldwin v. New York*, 399 U.S. 66, 72-73 (1970) (holding that offenses that carry greater than six months in prison are "serious" and defendants charged with them are entitled to a trial by jury). Likewise, 18 U.S.C. § 247(b) imposes a prison term of not more than one year and a fine under Title 18 for anyone who intentionally obstructs an individual from the free exercise of religious beliefs. *See* 18 U.S.C. § 247(b)-(c). Section 3631 of Title 42 prevents similar activity relating to intimidation in cases arising under the Fair Housing laws. *See* 42 U.S.C. § 3631(a)-(c) (1994). The minimum penalty under this section is not more than one year in prison and a fine under Title 42. *See id.* In all three cases, the maximum prison term of one year makes the offense "serious" as it is a Class A misdemeanor. *See* 18 U.S.C. § 3559(a)(6) (1994). The maximum fine for a Class A misdemeanor that does not result in death is \$100,000. *See id.* § 3571(b)(5). The House version of FACE, therefore, was modeled on the three civil rights statutes above. *See* H.R. CONF. REP. NO. 103-488, at 8 (1994), *reprinted in* 1994 U.S.C.A.A.N. 724, 725. The non-violent obstruction provision of FACE and the penalties imposed for its first offense, however, do not have similar counterparts in those acts. *See id.* at 9.

The legal impact of FACE ranges far beyond this portion of its penalty provisions, and a complete analysis of this Act is beyond the scope of this Note. *See generally* Kristine L. Sendek, Comment, "FACE"-ing The Constitution: The Battle Over the Freedom of Access to Clinic Entrances Shifts From Reproductive Health Facilities to the Federal Courts, 46 CATH. U. L. REV. 165, 196-203, 223-39 (1996) (arguing that FACE withstands challenges on First Amendment, vagueness, overbreadth, and Commerce Clause grounds).

217. 82 F.3d 1370 (7th Cir.), *cert. denied*, 117 S. Ct. 507 (1996).

218. *See id.* at 1379. This Note does not assert that Congress cannot impose a fine of greater than \$5,000 for a Class B or C misdemeanor or infraction. The language of 18 U.S.C. § 3571 clearly allows Congress to impose a fine greater than that specifically enumerated for these classes of offenses. *See* 18 U.S.C. § 3571(b)(1) (a defendant may be fined "the amount specified in the law setting forth the offense"). This Note does, how-

*Las Vegas*²¹⁹ held that an offense that carried a maximum prison sentence of not more than six months was presumptively petty,²²⁰ it would be rare when this presumption could be overcome.²²¹ The proof necessary to do so would have to "clearly reflect a legislative determination that the offense in question [was] a 'serious' one."²²² The *Soderna* court held that a fine above that authorized by federal law for a petty offense does not necessarily overcome this presumption, and that the defendants were not entitled to a trial by jury.²²³ Chief Judge Posner, writing for the court,

ever, assert that by defining a petty offense in 18 U.S.C. § 19 as, in the case of an individual, meriting a fine "no greater than the amount set forth . . . in section 3571(b)(6) or (7)," Congress has preserved the jury trial right for any defendant charged with a Class B or C misdemeanor, or an infraction that carries a fine of greater than \$5,000, the amount set forth in section 3571(b)(6)-(7). See *id.* § 19; *id.* § 3571(b)(6)-(7).

219. 489 U.S. 538 (1989).

220. See *id.* at 543.

221. See *Soderna*, 82 F.3d at 1378-79; see also *Blanton*, 489 U.S. at 543 (reasoning that a presumptively petty offense may be serious if additional statutory penalties are so severe that they demonstrate that the legislature considered the offense serious).

222. *Soderna*, at 1378 (citing *Blanton*, 489 U.S. at 543). See generally John F. Gillespie, Annotation, *Right to Jury Trial for Offense Punishable by Fine Exceeding \$500 as Affected by Definition of Petty Offenses in 18 U.S.C.S. § 1(3)*, 40 A.L.R. FED. 876, 876-82 (1978 & Supp. 1996) (discussing the rationale employed by courts that had addressed the problem of whether to allow for a trial by jury in cases where a petty offense carried a fine greater than the \$500 maximum fine allowed by statute for such offenses).

223. See *Soderna*, 82 F.3d at 1379. Among the justifications Judge Posner presented in the decision was that 18 U.S.C. § 3571(c)(6) provided for fines of up to \$10,000 for organizations convicted of Class B or C misdemeanors. See *id.* Judge Posner reasoned that, "when we reflect that many individuals have more money than many organizations," a \$10,000 fine on an individual was not severe enough to merit a trial by jury. *Id.*

Judge Posner rested this reasoning on the Supreme Court decision in *Muniz v. Hoffman*, 422 U.S. 454 (1975). See *id.* In *Muniz*, a labor union received a \$10,000 fine for violating picketing injunctions. See *id.* at 456-58. The fine was imposed without a trial by jury. See *id.* at 457. The *Muniz* Court found no intention on the part of Congress to give unions the right to a trial by jury in actions arising from labor disputes. See *id.* at 462-72. The majority also held that the \$10,000 fine, which was \$9,500 more than the amount that could be imposed for a petty offense at the time, did not make the offense serious and thus entitle the union to a jury trial. See *id.* at 477.

Despite the *Muniz* holding and Judge Posner's reliance upon it in *Soderna*, it must be noted that a fine of \$10,000 is the maximum fine that can be imposed on an organization for a Class B misdemeanor—a petty offense. See 18 U.S.C. §§ 19, 3571(c)(6) (1994). So, although the *Muniz* Court stated that the statutory fine should not be given "talismanic significance," it appears that the fine has been codified. See *Muniz*, 422 U.S. at 477. Compare *id.*, with 18 U.S.C. § 19 (1994) (stating that for a petty offense, a fine can be imposed which is, "no greater than the amount set forth . . . in section 3571(b)(6) or (7) in the case of an individual" (emphasis added)). Cf. III ABA STANDARDS, *supra* note 4, at § 18-2.7(c)(iv) (proposing that "Revenue production is not a legitimate basis for imposing a fine.").

noted that, when inflation was taken into account, the maximum fine in FACE was not severe enough to entitle the defendant to a trial by jury.²²⁴

Based upon simple mathematical analysis, however, questions arise as to whether Judge Posner's mention of inflation assists in the evaluation of this offense.²²⁵ Measuring the rate of inflation from the years 1988-1994 using the Consumer Price Index,²²⁶ and calculating how the rate of inflation has devalued both the fine in *Soderna*²²⁷ and the maximum amount that 18 U.S.C. § 19 imposes for a petty offense,²²⁸ the *Soderna* fine is devalued by inflation to a cost of \$7,982.46,²²⁹ while the petty offense fine is devalued to a cost of \$3,991.23.²³⁰ When inflation is accounted for, as Judge Posner suggested, the *Soderna* fine is still twice as large as expressly allowed by Congress for petty offenses.²³¹ Even if it is stipulated that the petty offense fine is not affected by inflation, and retains its real value of \$5,000, the nominal fine under FACE, which must be devalued to real (1988) dollars, is still almost sixty percent greater than the petty offense fine.²³²

224. See *Soderna*, 82 F.3d at 1378-79. Judge Posner used *Blanton* as a benchmark because that decision established that a presumptively petty offense may become serious if the additional statutory penalties are severe. See *id.* at 1378; *Blanton*, 489 U.S. at 543; see also *Richter v. Fairbanks*, 903 F.2d 1202, 1204-05 (8th Cir. 1990) (holding that a mandatory 15-year revocation of a driver's license for a third-time DWI conviction was sufficiently severe, making the offense serious).

225. See *infra* app. at Equations 1-6.

226. See *infra* app. The CPI is a widely used, albeit imperfect, measure of the rate of inflation in the United States. See THOMAS H. WONNACOTT & RONALD J. WONNACOTT, INTRODUCTORY STATISTICS FOR BUSINESS AND ECONOMICS, § 22-3(B) at 673-74 (4th ed. 1990) (discussing the various difficulties and shortcomings of the CPI in measuring inflation and prices); see also ADVISORY COMM'N TO STUDY THE CONSUMER PRICE INDEX, SENATE FINANCE COMM., 104TH CONG., TOWARD A MORE ACCURATE MEASURE OF THE COST OF LIVING 20-64 (Comm. Print 1996)[hereinafter BOSKIN COMMISSION REPORT] (detailing the various biases and shortcomings of the CPI).

In applying the CPI to this situation, the most pressing concern is that the comparison being made is between consumer goods and criminal offenses. This would necessitate the assumption that a criminal balances the cost of crime with the cost of such basic items as milk and eggs. Complete accuracy would demand the creation of a measure by which to calculate the average criminal fine and the number of times a particular crime is committed, *i.e.* a "Criminal Consumer Price Index." While that task is beyond the scope of this Note, it is nevertheless possible to demonstrate inflationary trends using existing indices. See *infra* app.

227. See 18 U.S.C. § 248(b)(2) (1994) (maximum fine of \$10,000).

228. See *id.* §§ 19, 3571(b)(6)-(7) (maximum fine of \$5,000).

229. See *infra* app., at Equation 3.

230. See *infra* app., at Equation 4.

231. See *infra* app., at Equations 3-4.

232. See *infra* app., at Equation 3 & note 254 and accompanying text.

The decision in *Soderna* gives the courts and Congress a license to freely ignore statutory definitions,²³³ and legitimizes legislative and judicial efforts²³⁴ to expand the statutory penalties that may be imposed for petty offenses without permitting those defendants a jury trial.²³⁵ Specifi-

233. See *United States v. Kozel*, 908 F.2d 205, 207 (7th Cir. 1990) (arguing that the purpose of 18 U.S.C. § 19 was to place a ceiling of six months in prison and a maximum fine of \$5,000 for petty offenses). Compare *United States v. Soderna*, 82 F.3d 1370, 1378-79 (7th Cir.), *cert. denied*, 117 S. Ct. 507 (1996) (reasoning that the statutory definition of petty offenses does not control whether a defendant charged with a petty offense has a constitutional right to a trial by jury), and *United States v. Unterburger*, 97 F.3d 1413, 1415-16 (11th Cir. 1996) (stating that it was the maximum prison term that a defendant faced that determined a trial by jury right, and not the maximum fine that could be imposed under FACE), with *United States v. McAlister*, 630 F.2d 772, 774 (10th Cir. 1980) (holding that where a defendant was charged with an offense carrying a fine greater than the statutory definition of a petty offense, the defendant was entitled to a jury trial), and *United States v. Lucero*, 895 F. Supp. 1419, 1420 (D. Kan. 1995) (holding that because the maximum fine under FACE exceeded the statutory definition of a petty offense, the defendant was entitled to a trial by jury). See generally III ABA STANDARDS, *supra* note 4, at § 18-2.7(b) (proposing that the decision whether to impose a fine, "up to the authorized maximum," should remain at the discretion of the sentencing judge).

234. On its face, 18 U.S.C. § 19 is absolutely unambiguous and clear. See 18 U.S.C. § 19 (1994). When statutory language is clear, it will normally be conclusive. See *United States v. Clark*, 454 U.S. 555, 560 (1982); see also 2A SINGER, *supra* note 191, at § 46.04, at 98-99 (discussing the doctrine that courts are required to give effect to statutory language when that language is "clear and unambiguous"); *id.* § 46.06, at 119-20 (stating that it is a basic rule of statutory construction that no part of a statute will be interpreted so that another part will be inoperative). But see KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 521-35 (1960) (arguing that for every canon of statutory construction that one might bring to bear on a point there is an equal and opposite canon); RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 276-77 (1985) ("A realistic understanding of legislation is devastating to the canons of construction . . . [in that] with a few exceptions, they have no value even as flexible guideposts or rebuttable presumptions . . . because they rest on wholly unrealistic conceptions of the legislative process."). See generally Richard A. Posner, *Statutory Interpretation—In the Classroom and In the Courtroom*, 50 U. CHI. L. REV. 800, 811-17 (1983) (providing a more complete explanation of Judge Posner's views on the inefficiency of the canons of statutory construction). Judge Posner's opinion in *Soderna* takes that clear language and creates ambiguity, thus allowing the judge to substitute his opinion for that of the legislature. Compare *Soderna*, 82 F.3d at 1378-79 (holding that a fine in excess of the statutory maximum for a petty offense did not make that offense serious), with *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 541 (1989) (stating that the courts should not substitute their judgment for that of the legislature), and *Lake Cumberland Trust v. E.P.A.*, 954 F.2d 1218, 1222 (6th Cir. 1992) (stating that it is an accepted canon of construction that no part of a statute will be interpreted so as to render another part of the statute inoperative).

235. Cf. *Soderna*, 82 F.3d at 1378-79 (holding that the presumption that an offense was petty was not overcome by authorization of a fine twice the amount that Congress had defined as being the maximum fine that could be imposed for a petty offense). The only federal case where this presumption was overcome was *Richter v. Fairbanks*, 903 F.2d 1202 (8th Cir. 1990). *Richter*, a federal habeas corpus proceeding, held that a mandatory 15-year revocation of a driver's license for a third conviction for driving under the influence of alcohol was sufficiently severe. See *id.* at 1204-05. The court found that when coupled with

cally, there is nothing to prevent a court, with statutory approval, from imposing fines greater than the \$5,000 petty offense maximum on defendants convicted of single or multiple petty offenses while denying those defendants a trial by jury.²³⁶ Combined with the deprivation of liberty posed by the threat of consecutive sentences, *Soderna* threatens a petty offense defendant with potentially grave economic loss.²³⁷

D. *Last Gasp or Resurrection?*

The Court in *Blanton* stated that there would be certain cases where additional statutory penalties, coupled with the maximum authorized prison term, would demonstrate that a legislature determined that offense to be serious.²³⁸ This exception could be applied in post-conviction appeals when consecutive sentences were imposed for multiple petty offense convictions.²³⁹

the maximum prison term authorized, the presumption that the offense was petty was overcome, and that the legislature had, in fact, considered the offense serious. *See id.*

236. *See Lewis v. United States*, 116 S. Ct. 2163, 2168 (1996) (holding that defendants charged with multiple petty offenses were not entitled to aggregate the potential prison term faced in order to secure a trial by jury).

237. *But see* III ABA STANDARDS, *supra* note 4, at § 18-2.7(c)(i) (proposing that the sentencing court should consider the financial means of the defendant, while respecting the other financial obligations of the defendant, when deciding whether to impose a fine and for what amount).

238. *See Blanton*, 489 U.S. at 543.

239. It must be noted at the outset that there is no constitutional right to appeal. *See McKane v. Durston*, 153 U.S. 684, 687 (1894). The right to appeal in criminal cases is "purely a creature of statute." *Abney v. United States*, 431 U.S. 651, 656 (1977). Appellate review of criminal sentencing in the federal judicial system is provided through 18 U.S.C. § 3742 (1994). A defendant may appeal his or her sentence by alleging that it "was imposed in violation of the law; . . . was imposed as a result of an incorrect application of the sentencing guidelines; . . . is greater than the sentence specified in the applicable guideline range; . . . , [or] was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable." *Id.* § 3742(a)(1)-(4); *see also* *United States v. Giddings*, 37 F.3d 1091, 1093 (5th Cir. 1994) (listing the criteria which would, under 18 U.S.C. § 3742, merit vacating a sentence); *United States v. Headrick*, 963 F.2d 777, 779 (5th Cir. 1992) (same); *United States v. Gabay*, 923 F.2d 1536, 1544 (11th Cir. 1991) (same).

As petty offenses are Class B and C misdemeanors or infractions, the Federal Sentencing Guidelines are not applicable to them. *See* 18 U.S.C. § 19 (defining petty offenses as Class B or C misdemeanors or infractions); UNITED STATES SENTENCING COMMISSION, FEDERAL SENTENCING GUIDELINES MANUAL 10 (1995) ("[T]he guidelines will apply to more than 90 percent of all felony and Class A misdemeanor cases in the federal courts."); *see also* Cheryl G. Bader & David S. Douglas, *Where to Draw the Guideline: Factoring the Fruits of Illegal Searches into Sentencing Guidelines Calculations*, 7 *TOURO L. REV.* 1, 1 n.1 (1990) (noting that petty offenses are not covered by the federal sentencing guidelines). This leaves the defendant who is sentenced to consecutive terms on multiple petty offenses the option of appealing on the grounds that either the sentence was imposed in violation of the law, or was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable. *See* 18 U.S.C. § 3742(a)(1),(4).

Reading the authorization of consecutive sentences contained in the criminal code along with the prescribed sentence for any criminal offense, it might be argued that the imposition of consecutive sentences is an additional statutory penalty.²⁴⁰ Thus, imposition of consecutive sentences in a multiple petty offense proceeding could trigger appellate review²⁴¹ to determine whether the imposition of consecutive sentences showed that the defendant had been tried for the equivalent of a serious offense.²⁴²

There is nothing in *Lewis* that explicitly rejects an approach that would allow a defendant convicted of multiple petty offenses, and sentenced to consecutive terms in prison, to show on post-conviction appeal that he or

The record for review consists of "(1) that portion of the record in the case that is designated as pertinent by either of the parties; (2) the presentence report; and (3) the information submitted during the sentencing proceeding." *Id.* § 3742(d)(1)-(3). In determining whether the sentence was imposed in violation of law or was plainly unreasonable, "[t]he court of appeals shall give due regard to the opportunity of the district court to judge the credibility of witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous." *Id.* § 3742(e). If the court of appeals determines that the sentence was plainly unreasonable and determines the sentence to be too high, it shall set the sentence aside and remand the case for resentencing. *See id.* § 3742(f)(2)(A). Upon remand, the district court will correct the sentence in accord with the findings of the court of appeals. *See* FED. R. CRIM. P. 35(a)(1).

Research for this Note has produced no cases involving a petty offense prosecution and a subsequent appeal on the basis that the sentence imposed was plainly unreasonable. There is case law that involves the "plainly unreasonable" standard, but it involves cases where, although there was no sentencing guideline, there did exist policy in the federal sentencing guidelines upon which review for a "plainly unreasonable" sentence could be based. *See Giddings*, 37 F.3d at 1097 (holding that a sentence imposed was not plainly unreasonable if in accord with a similar, mandatory guideline in the Federal Sentencing Guidelines); *Headrick*, 963 F.2d at 782-83 (same). It does seem reasonable to infer, however, that a sentence similar to that imposed in *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974), would qualify for the "plainly unreasonable" standard in 18 U.S.C. § 3742(a)(4). Compare 18 U.S.C. § 3742(a)(4) (setting forth the "plainly unreasonable" standard for review of sentences not subject to the Federal Sentencing Guidelines), with *Codispoti*, 418 U.S. at 516-17 (holding that defendant sentenced to 39 months in prison on multiple petty offenses was entitled to a trial by jury). It is apparent from both the text of 18 U.S.C. § 3742 and Rule 35 of the Federal Rules of Criminal Procedure that any remand on these grounds would be for resentencing, and not for retrial. *See* 18 U.S.C. § 3742(f)(2)(A) (stating that the court of appeals would remand for "sentencing proceedings"); FED. R. CRIM. P. 35(a)(1) (resentencing of defendant in accordance with a remand pursuant to 18 U.S.C. § 3742(f)(2)(A)).

240. *See Blanton*, 489 U.S. at 543 (reasoning that there may be additional statutory penalties that, when combined with the maximum authorized period of imprisonment, clearly show that the defendant had been tried for what the legislature considered a serious offense).

241. *See* IV ABA STANDARDS, *supra* note 4, at § 22-5.3(b) & commentary at 61 (proposing that appellate courts exercise a broad scope of review "so that all pertinent legal issues are considered on their merits," and not on formalities).

242. *See Codispoti*, 418 U.S. at 517 (holding that a defendant, though not sentenced to more than six months imprisonment on any individual charge, had been convicted of the equivalent of a serious offense because consecutive sentences were imposed).

she had been tried for the equivalent of a serious offense because the sentence imposed was "plainly unreasonable."²⁴³ As *Codispoti* was not explicitly overruled, a defendant sentenced to consecutive terms of imprisonment exceeding six months may argue that the imposition of consecutive sentences, read in conjunction with the maximum prison term authorized for the crime, demonstrates that the defendant was tried for the equivalent of a serious offense.²⁴⁴ As such, the appellant was originally entitled to a trial by jury, and is now entitled to, at the minimum, a remand for resentencing on more reasonable grounds.²⁴⁵

IV. CONCLUSION

The *Lewis* Court chose a bright line test that sets a high standard in determining if a defendant charged with a petty offense may receive a trial by jury. The Court's holding exposes defendants charged with multiple petty offenses to prison sentences normally reserved for defendants convicted of serious offenses. The strong interest of the state in prosecuting petty offenses efficiently and economically, however, outweighed the right of the defendant to a trial by jury. Although this decision may entice legislatures to impose greater fines for petty offenses, such fines arguably may be additional statutory penalties so severe as to elevate the petty offense to the equivalent of a serious offense. While this option provides little pretrial comfort to the defendant charged with multiple

243. See 18 U.S.C. § 3742(a)(4) (allowing a defendant to appeal a sentence for an offense with no applicable sentencing guideline, alleging that it was "plainly unreasonable"); cf. *Lewis v. United States*, 116 S. Ct. 2163, 2167 (1996) (holding that aggregation of multiple petty offenses was impermissible in determining whether a defendant was entitled to a trial by jury, however, failing to state how a defendant sentenced to consecutive terms of imprisonment exceeding six months on multiple petty offenses could appeal what would normally be the equivalent of a serious offense).

244. See *Codispoti*, 418 U.S. at 517.

245. The Court in *Lewis* stated that, where the legislature had determined that an offense was petty, the Court did not "look to the potential prison term faced by a particular defendant who is charged with more than one such petty offense." *Lewis*, 116 S. Ct. at 2167. (first emphasis added). The words "potential prison term" provide the view of the court before trial. There is nothing in the language of the Court's holding that shows a desire to entirely cut off post-conviction review of sentences imposed on defendants convicted of multiple petty offenses. Cf. *id.* Indeed, the *Lewis* Court reaffirmed the value of a jury trial in preventing arbitrary exercises of official power. See *id.* An example of an arbitrary exercise of official power is the imposition of consecutive sentences for multiple petty offenses. Cf. *Codispoti*, 418 U.S. at 517 (discussing why the imposition of consecutive sentences, in the context of a trial for multiple criminal contempts of court, may be an abuse and arbitrary use of official power, and therefore require a jury trial).

petty offenses, it does at least provide post-conviction hope to set right any potential wrong incurred because of the denial of a trial by a jury.

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MATHEMATICAL APPENDIX

It is possible to analyze mathematically Judge Posner's suggestion that the rate of inflation does not clearly render "serious" the maximum fine that can be imposed under FACE.

A. Consumer Price Index Analysis

The Consumer Price Index (CPI) is used to measure the rate of inflation and compare prices over time.²⁴⁶ The CPI is the aggregate price of a large basket of goods purchased by an average consumer at a particular time.²⁴⁷ Changes in this figure over time indicate inflationary changes in prices.²⁴⁸ The CPI takes on particular usefulness when it is used to measure the "real price" or "constant dollar" cost of a particular good.²⁴⁹ Because inflation increases the current cost of a good, often called the "nominal price" or "current dollar" cost, measuring the change in the CPI from a stated base year through the present year can give us the real price of that good, as it would cost in the base year.²⁵⁰ If the real price of a good is greater than its current dollar price, its cost has risen above the rate of inflation.²⁵¹ Likewise, if the real price is less than its current dollar price, its cost has fallen relative to inflation.²⁵² The real price (RP) is calculated by dividing the CPI for the base year (X) by the CPI for the current year (Y), and multiplying it by the current dollar price (CDP) of that good.²⁵³ The equation is thus stated as:

$$\frac{CPI(X)}{CPI(Y)} \times CDP = RP \text{ [Equation 1]}$$

We can posit that the current dollar price of committing a first time, non-violent, obstruction of a clinic entrance is \$10,000.²⁵⁴ In *Soderma*, Judge Posner suggested that the base year for inflation should be 1989,

246. See ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS § 1.5 at 13-14 (2d ed. 1992).

247. See *id.* at 14.

248. See *id.*

249. See *id.*

250. See *id.*

251. See *id.*

252. See *id.*

253. See *id.*

254. See 18 U.S.C. § 248(b) (1994).

the year of the *Blanton* decision.²⁵⁵ The CPI for 1989 was 124.0.²⁵⁶ So let CPI(X) equal 124.0. The CPI for 1996 is currently unavailable, however, it has been calculated for 1994—the year FACE was enacted. The CPI for 1994 was 148.2.²⁵⁷ So let CPI(Y) equal 148.2. With that, the equation can be stated as:

$$\frac{124.0}{148.2} \times \$10,000 = \$8,367.07 \text{ [Equation 2]}$$

Stated in terms of the value of the dollar in 1989, the fine that can be imposed today for a first time non-violent obstruction of a clinic entrance is \$8,367.07. A fine of \$5,000 could have been imposed for a petty offense in 1989.²⁵⁸ This means that in 1989, the dollar amount of a fine that theoretically could have been imposed had FACE been in effect at that time (\$8,367.07) would have exceeded the maximum petty offense fine that could have been imposed by statute by \$3,367.07, an amount greater than sixty percent.

Continuing this mathematical analysis, it would be helpful to compare the fine that can be imposed under FACE with the maximum statutory petty offense fine from the date that the statutory maximum fine was authorized. Such a comparison would assist in understanding Judge Posner's suggestion that inflation demonstrated that the fine imposed under FACE was not clearly severe because it would demonstrate the real values of both fines.

The maximum fine imposed for a petty offense was increased from \$500 to \$5,000 in 1988.²⁵⁹ The CPI was 118.3 in 1988, and was 148.2 in 1994, the year FACE was enacted.²⁶⁰ Accordingly, CPI(X) will equal 118.3, and CPI(Y) will equal 148.2. Again, the CDP will be the fine of \$10,000. This allows for the following equation:

$$\frac{118.3}{148.2} \times \$10,000 = \$7,982.46 \text{ [Equation 3]}$$

255. See *United States v. Soderna*, 82 F.3d 1370, 1378 (7th Cir.), *cert. denied*, 117 S. Ct. 507 (1996).

256. See DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1995 492, tbl. 761 (115th ed. 1995)[hereinafter STATISTICAL ABSTRACT]. The CPI uses a base year, 1983-1984, where the CPI is equal to 100, in order to provide consistency in comparisons over the time period 1960-1995. See *id.* CPI-U, the CPI for all urban consumers (approximately 80%), is used for these equations. See *id.* at 489.

257. See *id.*

258. See 18 U.S.C. §§ 19, 3571(b)(6)-(7).

259. See Criminal Fines Improvements Act, Pub. L. 100-185 § 6, 101 Stat. 1280 (1987) (codified at 18 U.S.C. § 3571).

260. See STATISTICAL ABSTRACT *supra* note 256, at 492, tbl. 761.

Thus the fine imposed under FACE, had it been in effect in 1988, was \$7,982.46. As stated above, the maximum fine that could be imposed for a petty offense in 1988 was \$5,000.²⁶¹ Therefore, the fine in real dollars (1988) that could be imposed under FACE was \$2,982.46 higher than the statutory maximum fine that could be imposed for petty offenses at that time, an amount almost 60% greater than the maximum petty offense fine.

Moreover, it cannot be assumed that inflation devalues the fine imposed under FACE without devaluing the fine to which we are comparing it to—the maximum statutory petty offense fine. That fine can be devalued over the same time period and compare it against the devalued cost of the maximum fine under FACE. We can assume that the current dollar price of a petty offense is \$5,000.²⁶² Moreover, the base year for any calculation will be 1988—the year that the fine was increased to \$5,000.²⁶³ The CPI for 1988 was 118.3.²⁶⁴ This allows CPI(X) to equal 118.3. The CPI for 1994 was 148.2.²⁶⁵ This allows CPI(Y) to equal 148.2. The equation is thus:

$$\frac{118.3}{148.2} \times \$5,000 = \$3,991.23 \text{ [Equation 4]}$$

So, in real dollars (1988), the cost of a petty offense was just over \$1,000 less than was authorized by statute. Comparing it to the real price of the FACE fine in 1988 dollars, (\$7,982.46), the equations above demonstrate that the FACE fine is still twice as large as the maximum petty offense fine.²⁶⁶

The calculations above demonstrate that inflation has not devalued the \$10,000 FACE fine to such an extent as to keep it equal to the maximum statutory fine that can be imposed for petty offenses. If the petty offense fine is not devalued by inflation, the FACE fine would impose a fine approximately 60% greater than the statutory maximum. By devaluing the petty offense fine over the same period, the equations above demonstrate that the FACE fine remains twice as large as what Congress defines as being a permissible fine for a petty offense. In *Soderna*, Judge Posner reasoned that an offense was not made “serious” simply because the fine,

261. See Criminal Fines Improvements Act § 6.

262. See *id.*

263. See *id.*

264. See STATISTICAL ABSTRACT, *supra* note 256, at 492, tbl. 761.

265. See *id.*

266. See *supra* app., at Equations 3-4.

as demonstrated, was greater than the statutory petty offense fine.²⁶⁷ The calculations show that, even after taking inflation into account, the FACE fine is greater than that fine presently allowed by Congress for a petty offense.²⁶⁸

It should be noted that, under this reasoning, the fine that could be imposed under FACE could theoretically be devalued such that it is less than what can be imposed for a petty offense. In other words, had Judge Posner posited a different base year, it is possible that the fine under FACE was less in real dollars than the statutory maximum petty offense fine in effect for that same base year. For purposes of the next two calculations, the base year will be 1968, as it is the year that *Duncan v. Louisiana* was decided.²⁶⁹ In the *Duncan* opinion, it was noted that, at that time, the maximum fine that could be imposed for a federal petty offense was \$500.²⁷⁰ The CPI in 1968 was 34.8.²⁷¹ Thus, for the following two equations, CPI(X) can be stated as 34.8. For our first equation, we can take the year that the fine for petty offenses was increased to \$5,000, 1988, as CPI(Y). The CPI for 1988 was 118.3.²⁷² This allows CPI(Y) to equal 118.3, and the current dollar price to equal \$5,000. Thus stated, the equation is:

$$\frac{34.8}{118.3} \times \$5,000 = \$1,470.84 \text{ [Equation 5]}$$

Thus, the real dollar value of a petty offense fine in 1988 was \$1,470.84, almost three times the value of the \$500 petty offense fine in 1968 was \$500.

In the second calculation, 1994 will be the (Y) year and the FACE fine will be the current dollar price. The CDP, therefore, is \$10,000. The CPI was 148.2 in 1994.²⁷³ So let CPI(Y) equal 148.2. The equation is as follows:

$$\frac{34.8}{148.2} \times \$10,000 = \$2,348.18 \text{ [Equation 6]}$$

267. See *United States v. Soderna*, 82 F.3d 1370, 1379 (7th Cir.), *cert. denied*, 117 S. Ct. 507 (1996) (finding that the increased fine was not sufficiently severe as to make the offense serious).

268. See 18 U.S.C. §§ 19, 3571(b)(6)-(7) (1994) (imposing a statutory maximum \$5,000 fine for petty offenses); *supra* app., at Equations 2-4 and accompanying text.

269. *Duncan v. Louisiana*, 391 U.S. 145 (1968).

270. See *id.* at 161.

271. See STATISTICAL ABSTRACT, *supra* note 256, at 492, tbl. 761.

272. See *id.*

273. See *id.*

Therefore, the real dollar value of a FACE fine in 1968 dollars is \$2,348.18, which is approximately four and a half times higher than the amount that could be imposed for a petty offense in 1968. The two sets of equations above tend to demonstrate that the FACE fine remains much higher than the petty offense fine.²⁷⁴

B. Gross Domestic Product Implicit Price Deflator Analysis

As mentioned previously, the CPI has been harshly criticized for overestimating the rate of inflation.²⁷⁵ Another method of evaluating how the cost of an item is devalued through inflation is using the Gross Domestic Product (GDP) implicit price deflator. The GDP is "the total output of goods and services produced by labor and property located in the United States, valued at market prices."²⁷⁶ The GDP is the primary measure of production in the United States because it provides the best measure for short-term analysis of the economy.²⁷⁷

GDP must be "deflated" in order to discount the effect that inflation has on its value. Current GDP will reflect both the quantity of goods and services produced as well as the increase in their prices, caused by inflation.²⁷⁸ By positing a base year and giving it a deflator value of 1.00, we can measure the effect of inflation on GDP and derive real GDP by divid-

274. It is possible to continue further back in time, calculating the devaluation of the fine at various points. In fact, it might very well disprove this analysis by selecting a base year so far back, for example, 1934, that it does prove to be less than that fine. See 18 U.S.C. § 541 (1934) (defining petty offenses as those punishable by six months in prison and a fine of \$500). The fact remains, however, that the petty offense fine has probably been even smaller than that in our history, and therefore Judge Posner's suggestion might again be subject to the same concerns raised in this appendix. If the fine was \$5 at some point in history, the fact that we might, through inflation, reduce the FACE fine to \$10 for that same base year only proves that the fine is still, after all those years, greater than the express statutory definition of Congress. The rate of inflation, it would seem, begs larger questions than it may be able to analyze. See *infra* text following note 288 (questioning whether the tools of economics allow us to measure how an offense is viewed by society).

It should be noted that the equations in this appendix are a very basic attempt to use economic analysis to measure some effect that economic forces have on the value of criminal fines. Whether fines adequately deter criminal conduct is a separate matter entirely, one that is beyond the scope of this Note. See generally RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW*, §7.2 at 223-29 (4th ed. 1992) (discussing Judge Posner's view of the utility of fines in deterring criminal conduct); Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J.L. & ECON. 519, 540-41 (1996) (discussing the economic effects of the stigma imposed by a criminal conviction).

275. See BOSKIN COMMISSION REPORT, *supra* note 226, at 20-64 (discussing the various biases and shortcomings of the CPI as a measure of the rate of inflation).

276. See STATISTICAL ABSTRACT, *supra* note 256, at 447.

277. See *id.* at 447-48. Prior to 1991, the Gross National Product was used for this purpose. See *id.* at 447.

278. See WONNACOTT & WONNACOTT, *supra* note 226, § 22-3(A), at 673.

ing the current GDP by the graph value of the GDP deflator.²⁷⁹ By this method, it is also possible to determine the GDP deflator if both the current GDP and real GDP are known. This calculation would be achieved by dividing the current GDP by the real GDP:

$$\frac{GDP(C)}{GDP(R)} = GDP \text{ Deflator [Equation 7]}$$

Once determined, the GDP deflator could be divided into the current price of any good to determine its real price.

In the 1995 version of the *Statistical Abstract of the United States*, the base year, or “constant dollar” year is 1987.²⁸⁰ GDP values are available through 1994.²⁸¹ As in Part A of this Appendix, the years 1987-1994 will be used as they span the period encompassing the enactment of the most recent changes to the federal fines structure, as well as the base year for GDP measurement, and the year that FACE was enacted.²⁸² First, it is necessary to determine the value of the GDP deflator for this analysis. The current dollar value of the GDP in 1994 was 6,738.4, and the real dollar value of the GDP for that year was 5,344.0.²⁸³ The equation is therefore:

$$\frac{6,738.4}{5,344.0} = 1.2609 \text{ [Equation 8]}$$

So, for the next two equations, our GDP deflator value will be 1.2609. As in Part A of this Appendix, the first equation will be the value of the FACE fine—\$10,000—devalued from 1987-94.²⁸⁴ The equation can thus be stated as:

$$\frac{10,000}{1.2609} = \$7,930.84 \text{ [Equation 9]}$$

279. See *id.* § 22-3(A), at 672-73 and Figure 22-1.

280. See STATISTICAL ABSTRACT, *supra* note 256, at 451, tbl. 699.

281. See *id.*

282. See 18 U.S.C. § 19, § 3571(b)(6)-(7) (1994); STATISTICAL ABSTRACT, *supra* note 256, at 451, tbl. 699. It must be noted that later comparison to calculations using the CPI will be imperfect, as the CPI calculations use a base year of 1988, while the GDP implicit price deflator uses a base year of 1987. The difference between the two results, however, will be minimal. See *infra* app., Equations 8-10, and notes 285-88 and accompanying text.

283. See STATISTICAL ABSTRACT, *supra* note 256, at 451, tbl. 699 (number in billions of dollars).

284. See 18 U.S.C. § 248(b)(2).

Comparing this to our result in Equation 3 of part (A) of this appendix, which gave us a devaluation value of \$7,982.46, we see that the difference in value is only \$52.46.²⁸⁵

The next calculation necessary is to measure the devaluation of the maximum petty offense fine, \$5,000, that § 19 of Title 18 specifies.²⁸⁶ Again, it will be measured over the years 1987-1994:

$$\frac{5,000}{1.2609} = \$3,965.42 \text{ [Equation 10]}$$

Thus, the petty offense value after inflation is \$3,965.42. Comparing this figure to the figure we calculated in Equation 4, \$3,991.23, we find that there is a difference of \$25.81.²⁸⁷ The relatively minor differences between the amounts calculated using the CPI and the GDP deflator demonstrate, in both instances, that even after inflation, the FACE fine is approximately twice as large as the petty offense fine.²⁸⁸

Having proven this, the question arises: what does this matter? All that has been shown is that one number is larger than the next. Depending upon the relative buying power of a person, one might have the means to consider the larger cost "petty," while another person might consider the smaller cost "serious." The petty offense exception is not based on the location of the mythical "criminal consumer" on the criminal fines indifference curve. To phrase it another way, does Judge Posner's interjection of the rate of inflation into the petty offense exception debate beg the larger question: do the tools of economics (here, devaluing a fine through price inflation) truly allow us to answer a question of subjective values—that being whether an offense is considered by the legislature to be "petty" or "serious," and whether defendants charged with "petty" offenses have the right to a trial by jury?

285. See *supra* app., at Equation 3 (finding a devaluation value of \$7,982.46 for the years 1988-94 using the CPI to measure inflation).

286. See 18 U.S.C. § 19, § 3571(b)(6)-(7) (maximum fine of \$5,000 for Class B misdemeanors, Class C misdemeanors, and infractions).

287. See *supra* app., at Equation 4 (using the CPI to show that the cost of a petty offense fine had been devalued to \$3,991.23 over the years 1988-1994).

288. See *United States v. Soderna*, 82 F.3d 1370, 1378 (7th Cir.), *cert. denied*, 117 S. Ct. 507 (1996); *supra* app., at Equations 3-4, 9-10.